

## Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions

Joost Pauwelyn

Luiz Eduardo Salles

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# Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions

Joost Pauwelyn<sup>†</sup> & Luiz Eduardo Salles<sup>††</sup>

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## Introduction

This article pursues Professor Yasuhei Taniguchi's inclination for procedural questions and applies it to the central problem in one of Taniguchi's most celebrated rulings, *Mexico–Soft Drinks*<sup>1</sup> (a case he chaired on appeal), namely, forum shopping before international tribunals. The *Soft Drinks* dispute between Mexico and the United States originated because of contested sugar quotas allocated to Mexico under the North

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<sup>†</sup> Professor of International Law, Graduate Institute of International and Development Studies, Geneva.

<sup>††</sup> Associate, Barreto Ferreira, Kujawski, Brancher e Gonçalves—Sociedade de Advogados, São Paulo; PhD Candidate, Graduate Institute of International and Development Studies, Geneva—at the time of writing this article, Teaching and Research Assistant at the Graduate Institute, Geneva. The authors would like to thank the participants at the symposium in honor of Professor Taniguchi for their comments as well as the editors of the *Cornell International Law Journal* for their hard work on the symposium and this article.

1. Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Appellate Body Report, *Mexico–Soft Drinks*].

American Free Trade Agreement<sup>2</sup> (NAFTA).<sup>3</sup> When Mexico attempted to enforce those alleged quota rights under NAFTA, the procedure was stranded in the panel selection stage where, according to Mexico, the United States simply refused to appoint panelists in violation of NAFTA.<sup>4</sup> To retaliate against this state of affairs, and instead of gaining larger quota shares on the U.S. sugar market, Mexico imposed a discriminatory tax on imports of U.S. soft drinks.<sup>5</sup> The United States then decided to challenge the Mexican tax, not under NAFTA, but at the World Trade Organization (WTO).<sup>6</sup> In the WTO proceedings, Mexico insisted that the larger U.S.-Mexico "sugar war" be decided under NAFTA, where Mexico had already requested a panel.<sup>7</sup> The United States, in contrast, insisted that it had the right to a WTO ruling on the consistency of the Mexican tax.<sup>8</sup> Both the panel and the Appellate Body sided with the United States and found that the tax violated the General Agreement on Tariffs and Trade<sup>9</sup> (GATT).<sup>10</sup> Mexico's claim before NAFTA remains undecided.

The goal of this article is not to critically examine the *Soft Drinks* ruling.<sup>11</sup> Rather, the article examines the nature and potential concerns of the relatively new phenomenon of forum shopping among international tribunals. Further, it asks the question whether domestic law principles such as *res judicata*, *lis pendens*, and *forum non conveniens* could be used to alleviate such concerns. The article finds that, to the extent these principles apply before international tribunals, they fail to address the problem. Instead, states should regulate forum shopping explicitly in their treaty regimes, and international tribunals should defer to such explicit treaty clauses. The article identifies the distinction between questions of a tribunal's jurisdiction and questions of admissibility of claims as key to the implementation of jurisdictional coordination—be it through general principles of law or treaty rules on forum selection. This distinction is generally applicable before international tribunals but has been overlooked in the WTO context. The article also argues that to deal with the rise of forum shopping in international adjudication, more thought should be given to the question of whether tribunals have or should have some margin of judicial discretion not to exercise jurisdiction in cases in which forum shop-

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2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

3. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005) [hereinafter Panel Report, *Mexico—Soft Drinks*].

4. See Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 1, ¶ 19 n.33.

5. See Panel Report, *Mexico—Soft Drinks*, *supra* note 3, ¶ 7.14.

6. See *id.* ¶¶ 1.1–1.2.

7. See *id.* ¶¶ 3.2, 7.11.

8. See *id.* ¶¶ 4.150–4.157.

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

10. See generally Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 1; Panel Report, *Mexico—Soft Drinks*, *supra* note 3.

11. In the interest of full disclosure, one of the authors of this article drafted the amicus curiae brief submitted by the Mexican sugar industry to the Appellate Body in *Soft Drinks*.

ping is at stake. To put these proposals in dynamic context, the article uses four variables, or scales, that will impact the assessment of both concerns and solutions for forum shopping among international tribunals, namely (1) a regime vs. system approach to international tribunals, (2) a party-focus vs. legality-focus, (3) consensual vs. compulsory jurisdiction, and (4) specific vs. general jurisdiction.

The article proceeds in the following manner. Part I assesses the main concerns with forum shopping in domestic law, compares these concerns to international law, and identifies a number of variables that condition the emergence of this phenomenon internationally. Part II discusses where one could look for solutions to these concerns, briefly surveys domestic law solutions, and suggests that to avoid the risk of inconsistent rulings states should explicitly regulate forum selection when creating new tribunals or new treaties. In Part III, we explain the procedural technique through which general principles of law and treaty clauses on forum choice can play a role in jurisdictional coordination between WTO adjudicative bodies and other international tribunals by introducing the distinction between jurisdiction and admissibility. Part IV discusses why “general principles” such as *res judicata*, *lis pendens*, and *forum non conveniens* do not appropriately address the problem of forum shopping at the international level. This finding reinforces the argument that states should address the problem explicitly when negotiating their dispute settlement obligations. Part V argues that, given the move along the four scales identified earlier, some room for judicial discretion is needed to provide the necessary flexibility for jurisdictional coordination and advocates the emergence of the notion of *le juge naturel* or the “natural forum” as a possible solution.

## I. Forum Shopping in International Law: Identifying the Real Concern

The problem of overlapping jurisdictions and forum shopping across domestic courts has assumed increasing relevance, but is in essence an old one.<sup>12</sup> In international law, however, this problem is relatively new. For a long time, and in most cases, there was simply no international court to turn to, let alone *two* tribunals whose jurisdiction overlapped.<sup>13</sup> With the

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12. See, e.g., ANDREW BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* 11-12, 25 (2003); Arthur Taylor Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices in Common- and Civil-Law Systems*, 295 *RECUEIL DES COURS* 9, 34-37, 179 (2002).

13. See, e.g., GERALD FITZMAURICE, 2 *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 437 (1986).

Just as in the domestic field it is rare for no court at all to have jurisdiction, and the issue is usually which of two or more possible forums is the correct one . . . conversely, is it a rarity in the international field for there to be any possibility of more than one forum.

*Id.* Writing as recently as 2006, Shabtai Rosenne had this to say: “Questions of the conflicting jurisdictions, or conflicting competences, of international tribunals are rarely

recent boom in international tribunals, it is well documented that international law now also faces the “luxury problem” of multiple, overlapping courts.<sup>14</sup> This development is, first and foremost, a welcome one. Multiple courts are better than no courts at all.<sup>15</sup> Clearly, to have several fora available is a boon for complainants. It may also guarantee that all elements of a multi-faceted dispute are actually resolved, such as a dispute over territorial delimitation at the International Court of Justice (ICJ) and a related trade restriction at the WTO.<sup>16</sup> A healthy level of competition among tribunals may also improve the quality of rulings and the expediency of proceedings. One tribunal keeping a critical eye over another can, finally, offer a welcome level of control over international tribunals and indirectly enhance their legitimacy.<sup>17</sup>

That said, there is no doubt that sequential or overlapping proceedings before international tribunals can, and do, raise concerns. Those concerns can be divided in two broad types: party-related concerns and society—or system-related—concerns. The tables below summarize these concerns and compare them as they arise under domestic law and international law.

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encountered.” SHABTAI ROSENNE, 2 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005*, at 518 (4th ed. 2006).

14. See YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003) [hereinafter SHANY, *THE COMPETING JURISDICTIONS*]; see also Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160, 160–61 (2000); Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA ‘Spaghetti Bowl’ is Cooking*, 9 J. INT’L ECON. L. 197, 197 (2006); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 727 (1999).

15. See Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT’L & COMP. L.Q. 791 (2006); Syméon Karagiannis, *La Multiplication des Juridictions Internationales: Un Système Anarchique?*, in *LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL* 7 (Société Française pour le Droit International ed., 2003); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT’L L. 929, 958–59 (2004).

16. Nicaragua allegedly imposed taxes on imports from Honduras and Colombia as a response to an agreement on maritime delimitation between Honduras and Colombia that would have violated Nicaragua’s rights. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 7 April 2000*, ¶¶ 49–51, WT/DSB/M/78 (May 12, 2000). Honduras highlighted that “the subject of maritime limits did not fall within the WTO mandate, and should be dealt with by the competent forum such as the International Court of Justice.” *Id.* ¶ 61. The ICJ eventually drew the maritime boundary between Nicaragua and Honduras. See *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. 1, 93 (Oct. 8).

17. Cf. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 440–49 (2007).

Table 1: PARTY Concerns With Forum Shopping

<i>Domestic law</i>	<i>International law</i>
Cost of multiple proceedings	Often <i>less</i> of a concern Given that most parties in international disputes are states, litigation cost is less of an issue. <sup>18</sup> The cost of multiple proceedings can be a serious concern, however, for poor countries and for certain private parties (e.g., individuals or small or medium-sized corporations).
Finality of rulings; avoidance of oppressive litigation tactics	<i>Same</i> concern Note, however, that finality of rulings only applies to sequential proceedings, not to parallel proceedings where no ruling has been issued yet.
Inconsistent rulings may leave the dispute unresolved	Of <i>greater</i> concern The absence of a “supreme court” in international law that can settle inconsistent rulings amplifies the party concern of inconsistent rulings which, as a result, may leave the dispute unresolved or even create new disputes.
Avoidance of double jeopardy or double compensation	<i>Same</i> concern
Party equality	<i>Same</i> concern Because choice of forum may alter the substantive outcome of a dispute, there is an abstract interest that the “right” forum be used.

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18. See Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191, 201 (1999).

Table 2: SOCIETY or SYSTEM Concerns With Forum Shopping

<i>Domestic law</i>	<i>International law</i>
Waste of resources for society as a whole	Often less of a concern The amount and total cost of international law litigation remains relatively small. <sup>19</sup>
Stability and security of the "system" (similar to finality argument as party-concern)	<i>Depends</i> on whether the different tribunals consider themselves as operating within the same "system." If not, inconsistent rulings amongst them cannot threaten the "system" because there is none in the first place. <sup>20</sup> To give examples: do investor-state tribunals operating under different Bilateral Investment Treaties (BITs) belong to the same investment "system;" <sup>21</sup> do Mercado Común del Sur (MERCOSUR) tribunals and WTO panels operate in the same "system;" <sup>22</sup> and do WTO panels disagreeing with an earlier WTO Appellate Body report operate in the same "system" or do they decide distinct disputes? <sup>23</sup>
Inconsistent rulings can undermine the legitimacy and credibility of the "system"	

19. See generally Cesare P.R. Romano, *The Price of International Justice*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 281, 303 (2005). The cost to society is arguably more of a concern where the cost of the tribunal is covered by all parties to it (not just the disputing parties) through the institution's general budget, as in the WTO or the ICJ—unlike in investor-state arbitration where the disputing parties alone pay all costs. *Id.* at 303–04.

20. See Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 692 (1999).

21. Compare *Lauder v. Czech Republic*, Final Award, (UNCITRAL Arbitration) (Sept. 3, 2001), with *CME Czech Republic B.V. v. Czech Republic*, Final Award, (UNCITRAL Arbitration) (Mar. 14, 2003) (reaching different conclusions on the merits of disputes dealing with the same measures).

22. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 228, WT/DS332/AB/R (Dec. 3, 2007) (considering that exempting Uruguayan imports pursuant to a MERCOSUR ruling led to "arbitrary or unjustifiable" discrimination in the application of Brazil's import ban under the chapeau of GATT Article XX); Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.38, WT/DS241/R (Apr. 22, 2003) (accepting that the same measure be challenged sequentially before a MERCOSUR arbitral tribunal under the Protocol of Brasilia and WTO dispute settlement) [hereinafter Panel Report, *Argentina—Poultry*].

23. Compare Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.106, WT/DS344/R (Dec. 20, 2007) (deciding it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews"), with Panel Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 7.223, 7.227, 7.256, 7.259, WT/DS322/R (Sept. 20, 2006), and Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 3, 98, 100, 139, 184, WT/DS322/AB/R (Jan. 9, 2007) (the panel considering that "simple zeroing" is permissible, the Appellate Body considering that it is not). In a recent report, the Appellate Body reversed the panel's findings in *United States—Anti-Dumping Measures on Stainless Steel from Mexico*, noting, "[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system." Appellate Body Report, *United*

Based on the summary analysis above, the biggest concern with forum shopping among international tribunals seems to be, therefore, the *concern of inconsistent rulings* because:

- 1) inconsistent rulings may leave the dispute unresolved (a party-related concern amplified in international law because of the absence of a hierarchy of courts); and
- 2) inconsistent rulings can threaten the stability and legitimacy of the broader “system” within which the tribunals operate (of course, only if such a “system” exists in the first place).

Note, however, that even if no “system” exists and the concern of system stability or legitimacy does not arise, the party-concern of inconsistent rulings and of not seeing the dispute settled remains.<sup>24</sup> The party-concern of inconsistent rulings (point 1) may, therefore, dominate the system-concern of inconsistent rulings (point 2).<sup>25</sup>

Two further elements specific to international law may limit the problem of sequential or overlapping proceedings before international tribunals. These elements often lead international tribunals to decide cases that other fora have already decided, or might decide, in the future.

First, international tribunals traditionally operate under the principle of *party consent*. In domestic law, by contrast, courts operate on constitutional or statutory authority. As a result, if parties give an international tribunal explicit jurisdiction to decide a dispute, the tribunal often feels hard-pressed to fulfill its mandate and to decide the case, even if a second tribunal is competent or a parallel or sequential proceeding is, or can be, initiated. The tribunal may then be inclined to decide the case anyway because “that is what the parties asked it to do.”<sup>26</sup>

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*States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 162, WT/DS344/AB/R (Apr. 30, 2008). The Appellate Body also emphasized that the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.

*Id.* ¶ 160.

24. As Gilles Cuniberti puts it: “[T]he existence of conflicting decisions in different legal orders can cause harm. . . . [T]he situation of the parties will be intolerable, with each of them in danger of being deprived in one place of what it has been awarded in another.” Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID REV. FOREIGN INVESTMENT L.J. 381, 419–20 (2006).

25. *Id.* at 395–96 (arguing that substantive inconsistencies and the absence of settlement can be more fundamental a problem than the concern with intra-systemic coherence and therefore submitting that mechanisms should be available to avoid inconsistent decisions even across different systems).

26. See, for instance, the painstaking efforts by the arbitral tribunal in *Iron Rhine Railway* to decide the case on the basis of international law, including European law, while respecting the exclusive jurisdiction of the European Court of Justice. See generally *Iron Rhine (“IJzeren Rijn”) Railway (Belg. v. Neth.)* (Perm. Ct. Arb. 2005). *Contra* Nikolaos Lavranos, *The MOX Plant and the IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN J. INT’L L. 223 (2006).



Second, there is no top-down division of labor among international tribunals. The “international judiciary” is such that the authority of each body is limited by its own governing instruments, and there is no statute defining the authority of tribunals in relation to each other. Further, in practice, the jurisdiction of international tribunals is specific and depends, not on geographical factors (as is often the case in domestic law),<sup>27</sup> but rather on the treaty it is enforcing (e.g., WTO panels enforce WTO agreements, NAFTA panels enforce NAFTA). The treaty-based jurisdiction of international tribunals often means that even where there is overlapping jurisdiction, each tribunal decides a different aspect of the dispute (say, the ICJ decides issues of territorial delimitation and the WTO decides issues of trade).<sup>28</sup> Even if different tribunals decide the same issue, they often do so from a distinct legal angle (for example, national treatment under the GATT versus national treatment under NAFTA Chapter 11). In many cases, therefore, overlapping jurisdictions among international tribunals are less of a concern as compared to overlapping jurisdictions of domestic courts.

In sum, whether or not forum shopping before international tribunals is of genuine concern depends on at least three variables. First, the more a tribunal considers itself as operating within a broader “system” of interconnected tribunals (rather than a self-contained “regime” limited to, say, the WTO), the more problematic forum shopping becomes (the regime vs. system variable referred to earlier). In particular, the system-based concerns of inconsistent rulings (between, for example, a WTO panel and a MERCOSUR tribunal) and the threat to stability and legitimacy that such inconsistent rulings may bring about could necessitate better coordination. Second, the more international tribunals shift from *ad hoc* consent-based jurisdiction (as in a *compromis* before the ICJ) to compulsory jurisdiction (as in the WTO or BITs), the more forum shopping will raise concerns and the more tribunals will be forced to look beyond the increasingly weak argument that they must decide the case because “this is what the parties asked us to do.” This is illustrated in the consensual vs. compulsory jurisdiction variable that Cesare Romano recently highlighted,<sup>29</sup> a variable that also dovetails with the move from party-focused to legality-focused international dispute settlement. Third, the more that international courts move away from specific jurisdiction towards broader bases of jurisdiction,<sup>30</sup> the

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27. See, e.g., Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in *GLOBALISATION AND JURISDICTION* 105 (PIET JAN SLOT & MIELLE BULTERMAN eds., 2004).

28. See *supra* note 16 and accompanying text.

29. See generally Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791 (2007).

30. A good example of this shift, or difference, is BITs conferring jurisdiction to arbitrate legal claims under the BIT only versus BITs conferring jurisdiction more generally in regard to disputes “relating to investments made” under the BIT, without limitation as to the legal cause of action of such disputes (be it the BIT or an investment contract). Compare *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID (W. Bank) Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 131-135 (2004), with *SGS Société Générale de Surveillance S.A. v.*

more forum shopping will become a genuine problem (similar to overlaps between domestic courts).

Put differently, whereas forum shopping before international tribunals traditionally raised less concerns than its domestic counterpart (mainly because there are few international courts to begin with; costs in inter-state disputes are not a big issue; the jurisdiction of international tribunals is consent-based; no “system” of international tribunals exists; and the division between tribunals is precarious), over time the problem has grown. It is destined to continue to rise in prominence given the shift in the four variables outlined earlier, namely the moves: (1) from a regime to a system approach, (2) from a party-focus to a legality-focus, (3) from strictly consensual to compulsory jurisdiction, (4) and from specific to general jurisdiction.

## II. Where to Look for Solutions

### A. Domestic Law Solutions

In domestic law, one can discern three common scenarios of forum shopping and reactions thereto.

- First, there are *sequential* proceedings in which one court is seized of a dispute that another court already decided earlier. In that scenario, both common and civil law systems may apply the principle of *res judicata* (*l'autorité de la chose jugée*).
- Second, there are *parallel* proceedings in which one court is asked to decide a dispute while another court is also looking at it. In that scenario, civil law systems may apply the principle of *lis pendens* or rules on “related actions.”<sup>31</sup> Common law systems, in contrast, may apply the principle of *forum non conveniens* or other abstention doctrines. There, *lis pendens* may sometimes play a role as one of several factors to be looked at, but is not normally an independent principle to decide jurisdictional overlaps.
- Third, there are *alternative* proceedings in which one court is asked to decide a dispute over which another court also has jurisdiction, but this second court has not yet been or will never be seized. In that scenario, common law systems may also apply the *forum non conveniens* doctrine. Most civil law systems, in contrast, do not have a *forum non conveniens* doctrine;<sup>32</sup> and where they find jurisdiction, the civil law courts would not normally have the discretion to decline from exercising it—notwithstanding the presence of an alternative forum.

Another way to describe domestic law reactions to forum shopping is to distinguish broadly between three types of doctrines the seized court

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Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶ 161, 42 I.L.M. 1290, 1317–18 (2003).

31. See *infra* notes 163–167.

32. See *infra* note 138 and accompanying text.

may eventually apply. (There are no watertight dividing lines between the doctrines, yet the distinction is, in our view, useful.)

Firstly, there are *preclusion* doctrines. Preclusion doctrines bar either the jurisdiction of a court or the plaintiff's right to have her substantive claims examined.<sup>33</sup> Under preclusion doctrines (at least the way we define them), the second court does not have any discretion and *must* decide that it does not have jurisdiction or that the action (or claim) is precluded. The immediate consequence is similar in both cases: the dismissal of the case before a judgment on the merits. For instance, if another court already decided the dispute, *res judicata* can preclude the examination of the substantive claims before a second court. *Lis pendens* operates similarly if the dispute is pending elsewhere.

Secondly, there are *abstention* doctrines. These are doctrines or principles that do not preclude or take away the jurisdiction of the seized court. Instead, they lead that court, following a discretionary judicial evaluation, not to exercise its powers to pronounce on claims based on some factor extrinsic to the merits of the claims (for instance, the jurisdiction of another court). In other words, both courts can have jurisdiction over the specific case, but one of them may decide not to rule on one or more aspects of the claim because of the jurisdiction (pending or potential) of the other. Some measure of discretion *not to exercise established substantive or field-jurisdiction* (as we define this notion later) is inherent in abstention doctrines. Such judicial discretion is generally alien to civil law systems.<sup>34</sup> In many common law systems, however, that is exactly what happens under the *forum non conveniens* doctrine, which is a discretionary abstention doctrine. In the United States, more specific types of abstention doctrines also cover certain interactions between state and federal courts.<sup>35</sup>

Finally, there are the doctrines of *consolidation* or *joinder*. Rather than simply declining jurisdiction or not exercising it, domestic courts can also

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33. See *infra* Part III for the distinction between jurisdiction and admissibility.

34. Note, however, that rules on "related actions," discussed later, grant judicial discretion to exercise or not to exercise jurisdiction in civil law systems. Moreover, note that civil law systems may grant a wide margin of discretion within the appreciation of the law by courts through open-textured jurisdictional rules. Thus, Section 11 of Article 429c of the Code of Procedure of the Netherlands provides that "[a] court has no jurisdiction if the petition is insufficiently connected with the legal sphere of The Netherlands." See Mirjam Freudenthal & Frans Van Der Velden, *The Netherlands*, in *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* 321, 328 (J. J. Fawcett ed., 1995). In Greece, discretionary power within the application of the law exists by virtue of the prohibition on abuse of rights and the obligation to act in good faith. See Panagiotis Kargados & Elina Moustaira, *Greece*, in *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW*, *supra*, at 235, 242; see also Ellen L. Hayes, *Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation*, 26 U. BRIT. COLUM. L. REV. 41, 56 (1992) (envisioning that the objectives of *forum non conveniens* could also be achieved in Japan through the prohibition on abuse of rights or of dual suits); Akihiro Hironaka, *Jurisdictional Theory "Made in Japan": Convergence of U.S. and Continental European Approaches*, 37 VAND. J. TRANSNAT'L L. 1317 (2004).

35. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); see also Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102 (1998).

consolidate several related actions and rule on them in one proceeding.<sup>36</sup> A similar concept is joinder, which allows or mandates the coupling of several parties, claims, or remedies in a single action.<sup>37</sup> Both consolidation and joinder presume that the court deciding the case has jurisdiction to do so in respect to all aspects and parties to the dispute. The consolidation or joinder of different but related actions before a common adjudicator, possibly in one single proceeding, is a major tool for fostering coherence and saving judicial resources both in common law and civil law systems.<sup>38</sup> In both systems, consolidation and joinder normally occur based on explicit statutory provisions, not based on general principles or unwritten doctrines.<sup>39</sup>

## B. Alternatives for the International Judge

When a situation of forum shopping presents itself, several options, which are not necessarily mutually exclusive, are open to the international judge. First, the international judge could limit herself to the rules explicitly agreed on by the parties within the forum she is operating—for example, a WTO panel looking only at Dispute Settlement Understanding (DSU) rules.<sup>40</sup> In many cases, this will mean that the international judge will simply proceed and decide the case. In *Soft Drinks*, the United States

36. See NAFTA art. 1126, para. 2 (allowing the consolidation of proceedings with “a question of law or fact in common . . . in the interests of fair and efficient resolution of the claims”). See generally Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT’L 414 (2000). So far, two tribunals have decided consolidation claims. The *Corn Products* tribunal, on the one hand, focused on the unfairness to investors of a consolidation that the investors did not agree to and which would have negatively affected their procedural interests. See generally *Corn Prod. Int’l, Inc. v. United Mexican States*, ICSID (W. Bank) Case No. ABR(AF)/04/1, *Acher Daniels Midland Co., and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/04/5, Order of the Consolidation Tribunal (2005). The *Softwood* tribunal, on the other hand, focused on efficiency to the resolution of the claims in terms of procedural economy. See generally *Canfor Corp. v. United States, Tembec et al. v. United States, and Terminal Forest Prod., Ltd. v. United States*, Order of the Consolidation Tribunal (2005).

37. See the WTO intra-systemic rules on multiple complaints in Article 9 of the DSU, which states that a single panel should examine complaints related to the “same matter” whenever feasible and, when more than one panel is established, the same persons shall serve as panelists and the timetables should be harmonized. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 9.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

38. See “related actions” in civil law systems discussed *infra* notes 163–165 and accompanying text.

39. See, e.g., FED. R. CIV. P. 42; see also Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 29, 2000 O.J. (L 12) 1, 9 (EC).

40. Some authors argue that this is the only option for a WTO adjudicator. See, e.g., Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 465, 483 (Lorand Bartels & Federico Ortino eds., 2006) (“If an RTA contains an exclusive forum clause, nothing appears to prevent a WTO panel from proceeding to examine a claim of WTO violation even if, in doing so, one of the parties to the WTO dispute would be in violation of its RTA obligation.”); see also *id.* at

advocated this position, arguing that “if a panel were to decline to exercise jurisdiction over a particular dispute, it would diminish the rights of the complaining Member under the DSU and other covered agreements [contrary to Articles 3.2 and 19.2 of the DSU].”<sup>41</sup> Similarly, China, a third party in *Soft Drinks*, submitted that:

[A] WTO panel does not have an implied power to refrain from performing its ‘statutory function’ . . . . [I]f a panel that is ‘empowered and obligated’ to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU.<sup>42</sup>

Second, a slightly more adventurous judge could wander outside the four walls of the *lex fori* and ask whether there are general principles of law or domestic law analogies on which she could rely to resolve the problem. Mexico advocated this position in *Soft Drinks*, relying on, among other things, an old Permanent Court of International Justice (PCIJ) ruling expressing a variant of the so-called “clean hands theory.”<sup>43</sup> The panel showed some willingness to rely on general principles (in particular, *res judicata*), but quickly found that these principles would not undermine its obligation to decide the dispute.<sup>44</sup>

Defendants in other WTO disputes in which forum shopping was an issue have similarly relied on general principles such as good faith, abuse of process, and estoppel in an attempt to convince the WTO not to rule on the dispute. For instance, in *Argentina–Poultry*, Argentina (unsuccessfully) argued that Brazil’s double-challenge of the same measures, first before MERCOSUR and subsequently before the WTO, violated the principle of good faith and warranted application of the principle of estoppel.<sup>45</sup>

Third, the judge could insist upon relying only on party-agreed solutions (as in option 1), but be willing to look for those solutions outside of the forum within which she is operating (as in option 2). More specifically, the judge could then examine whether the parties have agreed on forum selection or conflict clauses in an outside treaty which created the forum shopping problem in the first place (for example, in a WTO dispute,

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481 (“It is difficult to see how WTO panels could decline jurisdiction for reasons of *res judicata*, *lis pendens*, or *forum non conveniens*.”).

41. Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 23.

42. *Id.* ¶ 34.

43. [O]ne Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

Factory at Chorzów (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26); *see also* Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 76 (Sept. 25).

44. Panel Report, *Mexico–Soft Drinks*, *supra* note 3, ¶ 7.14 (stating that neither the subject matter nor the respective positions of the parties would be equivalent in the disputes under NAFTA and the WTO).

45. Panel Report, *Argentina–Poultry*, *supra* note 22, ¶¶ 7.18–7.20.

a fork-in-the-road clause in NAFTA or another free trade agreement (FTA)).<sup>46</sup> This article argues that deferring to explicit treaty clauses on forum-election is the best solution for the problem of forum shopping in the current context. In the next section, we propose a conceptual framework for applying this solution before the WTO by distinguishing between the jurisdiction of tribunals and the admissibility of claims made before them.

Returning to *Soft Drinks*, it is worth noting that Mexico explicitly refused to rely on NAFTA's fork-in-the-road provision<sup>47</sup> before the WTO panel, even though Mexico could have made a plausible argument—given its earlier submission of the broader sugar dispute to NAFTA—that this fork-in-the-road clause precluded the United States from bringing its claims before the WTO. In its amicus curiae brief submitted on appeal, the Mexican sugar industry did, however, rely heavily on this NAFTA clause.<sup>48</sup> To

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46. For a more complete explanation of why WTO panels can also apply such treaty clauses outside WTO covered agreements, see Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?: Questions of Jurisdiction and Merits*, 37 J. WORLD TRADE 997 (2003).

47. NAFTA Article 2005 paragraph 6 reads, in relevant part: "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other." NAFTA art. 2005, para. 6.

48. Amicus Curiae Brief by Cámara Nacional de las Industrias Azucarera y Alcohólica—Mexico (CNIAA), ¶ 19, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Jan. 12, 2006) [hereinafter Cámara Nacional Amicus Brief, *Mexico—Soft Drinks*] (on file with the authors).

10. NAFTA Article 2005.1 states that "disputes regarding any matter arising under both NAFTA and GATT/WTO, may be settled in either forum at the discretion of the complaining party". The US does not contest that Mexico's tax at issue here is just one part of a broader US-Mexico sweetener dispute. Nor does the US contest that this sweetener "dispute" regards a "matter" arising under both NAFTA and the GATT/WTO.

11. Now, in 2000, Mexico, exercising the discretion offered to NAFTA parties in Article 2005.1, decided to bring this "dispute" to NAFTA. As of that point in time, though, Article 2005.6 reserves *exclusive* jurisdiction to NAFTA and *precludes* any WTO jurisdiction over the dispute. Article 2005.6 provides, indeed, that

[o]nce dispute settlement procedures have been initiated under [NAFTA] Article 2007 . . . the forum selected shall be used to the exclusion of the other [in *casu* the WTO] . . .

12. Unlike the principle of *res judicata* (implicitly referred to by the Panel in paragraph 7.13), Article 2005 of NAFTA is *not* conditioned on the fact that the same specific "measure" is before both NAFTA and the WTO. Rather, Article 2005 relates to "disputes" regarding a "matter". As the US concedes, the "matter" in the US-Mexico sweetener "dispute" is not limited to the US quota, nor to the Mexican tax. It covers both. Hence, the fact that the specific "measure" before the NAFTA (a US quota) is not the same as the specific "measure" before the WTO (a Mexican tax), is irrelevant under Article 2005 *for as long as these specific measures are part of one and the same "dispute" or "matter"*.

13. Similarly, Article 2005 is *not* conditioned on the fact that "the respective positions of the parties" are "identical" in both NAFTA and the WTO (Panel report, paragraph 7.15). Rather, once a dispute is before either forum (here, NAFTA), "the forum selected shall be used to the exclusion of the other". Article 2005.6 does not limit this restriction to the original complainant (in this case, Mexico). In other words, once Mexico brought the sweetener dispute to NAFTA,

its credit, the Appellate Body also considered the clause and left the possibility open that similar clauses could constitute a "legal impediment" for the WTO to rule on the merits of a case in the future.<sup>49</sup>

A choice between the three options set out above—forum rules only, general principles, and treaty clauses outside the forum—largely depends on two variables.<sup>50</sup> First, to what extent does the tribunal regard itself as a self-contained "regime" operating in isolation versus a dispute settlement mechanism operating as a part of a broader "system" of international law and tribunals (the regime vs. system variable)?<sup>51</sup> Second, and related to

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both Mexico and the United States were precluded from bringing it also to the WTO. Yet, this is what the US is trying to do here.

14. Finally, there can be no doubt that in this case "dispute settlement procedures have been initiated under Article 2007" of NAFTA, *even if no NAFTA Panel has actually been established*. What counts is the initiation of procedures under NAFTA Article 2007, that is, the second step of NAFTA Chapter 20 procedures, namely consideration by the Free Trade Commission. Panel proceedings are the third step and covered by Article 2008. The US itself has explicitly acknowledged that Mexico thus "initiated" NAFTA proceedings and that such proceedings remain pending to this day (and, therefore, continue to preclude WTO proceedings on the same dispute) . . . .

*Id.* ¶¶ 10–14.

49. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 1, ¶ 54.

Mindful of the precise scope of Mexico's appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute, and that only a NAFTA panel could resolve the dispute as a whole. Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA . . . and the dispute before us." Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA. It is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been "exercised". *We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present. In any event, we see no legal impediments applicable in this case.*"

*Id.* (emphasis added) (internal citations omitted).

50. Recall that the three stylized options laid out are not mutually exclusive. A tribunal could, for example, be willing to look at all three sets of rules (forum rules, general principles, and treaty clauses outside the forum) to eventually apply the forum or outside treaty rule based on the principle of *lex specialis*.

51. Compare Access to Information Under Article 9 of the OSPAR Convention (*Ir. v. U.K.*), ¶ 143 (Perm. Ct. Arb. 2003), 42 I.L.M. 1118 (2003), ("[T]he OSPAR Convention contains a particular and self-contained dispute resolution mechanism in Article 32, in accordance with which this Tribunal acts."), with *MOX Plant Case* (no. 3) (*Ir. v. U.K.*), Suspension of Proceedings on Jurisdiction and Merits (Perm. Ct. Arb. 2003), 42 I.L.M. 1187 (2003) (considering the possibility of the existence of exclusive jurisdiction of the European Court of Justice (ECJ) and opting for a stay in the proceedings until further clarification of the issue). See generally YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 110–16 (2007) (contrasting the two underlying judicial policies under the labels of "integrationism" and "disintegrationism").

the first, does the tribunal construe its task as simply resolving a dispute between two parties, or is it also responsible for expanding the legality or rule of law within the forum it operates (the party-focus vs. legality-focus variable)?<sup>52</sup>

Where a tribunal shifts from a “regime” to a “system” approach, it will be more open to rules and solutions outside the *lex fori*, be it general principles or domestic law analogies (option 2) or clauses in other treaties (option 3). Where a tribunal shifts from a party-focus to a legality or rule of law focus, it is likely to consider not only rules or solutions explicitly agreed to by the disputing parties themselves (as in options 1 and 3), but also general principles or domestic law analogies (as in option 2) which often require a degree of gap-filling or law-making by the tribunal itself.

In our view, the best way to develop rules to address the novel problem of overlaps between international tribunals is through the inclusion of explicit conflict and overlap clauses in the relevant treaties—that is, rules to which the parties themselves have explicitly agreed (option 1 and option 3). The alternative of relying on general principles and domestic law analogies (option 2) is at first blush convincing. Because domestic legal systems had to deal with similar problems, why not copy their rules instead of reinventing the wheel through specific treaty clauses that are often difficult and time-consuming to negotiate? Whereas domestic law analogies are appropriate in some respects (e.g., *res judicata*), this article argues that in other respects (such as *lis pendens* and *forum non conveniens*), they are not necessarily appropriate. More importantly, even where the incorporation of domestic law principles into international law makes sense (as with *res judicata*), in most cases these principles do not address the problem because the conditions for these principles to be triggered (especially the requirement that the other forum addresses the “same cause of action”) will usually not be met anyway.

Therefore, until international law develops its own general principles to deal with forum shopping (a first attempt to do so is made at the end of this article), reference to domestic law analogies in the current state of international law operates at best as a fig leaf for the tribunal in question to exercise jurisdiction anyway. Instead, in the current context, both defendants (who are concerned with forum shopping) and tribunals (who see themselves as part of a broader, though heavily decentralized, system of international tribunals) are better off applying forum clauses set out in other treaties (e.g., WTO panels applying a NAFTA fork-in-the-road clause). Complainants also stand to gain from this solution as they will at least have explicitly agreed to these clauses—a safeguard that is not always met

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52. Georges Abi-Saab recently underlined the importance of this variable: “la question fondamentale de la politique judiciaire à suivre se pose, ici comme ailleurs: est-ce que le but est simplement de régler un différend particulier dont on est saisi, ou doit-on se situer dans un contexte plus large, celui de contrôler et même d’affirmer la légalité?” Georges Abi-Saab, *Commentaire*, in *LA PREUVE DEVANT LES JURIDICTIONS INTERNATIONALES* 97, 97 (Hélène Ruiz Fabri & Jean-Marc Sorel eds., 2007) (“This is the fundamental question of judicial politics, both here and elsewhere: Is the goal simply to resolve the dispute before the court, or is it to control and strengthen legality in general?”).



in cases in which tribunals start to “discover” general principles of law based on domestic law analogies.

One of the beauties of international law is that, given its decentralized nature, solutions to new problems can be creatively developed in new treaties (as long as the state-parties agree to them) or case-by-case in specific disputes. If they work, those solutions can then be generalized to other fields and disputes. This piecemeal process, in which treaties such as bilateral Free Trade Agreements (FTAs) operate as test laboratories, can be particularly receptive to new ideas.

### III. Jurisdiction vs. Admissibility: Implementing Jurisdictional Coordination Between Autonomous International Tribunals

Before we turn to the applicability in international adjudication of the domestic law principles identified above, it is essential to identify the procedural technique to be used in applying these principles. We suggest employing preliminary objections to the *admissibility* of the request. This technique is based on the distinction between questions of *jurisdiction* and questions of *admissibility* (a distinction that has been well developed before other international tribunals but has so far been overlooked in the WTO context).

In international law, including WTO law, it is well accepted that certain questions of a preliminary character which are independent from the merits may nonetheless stop the proceedings before findings on the merits are made.<sup>53</sup> This eventuality need not be expressly stated in the governing instruments of the judicial body concerned.<sup>54</sup> Questions of jurisdiction

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53. In international law, this notion is generally uncontested. See, e.g., GEORGES ABI-SAAB, *LES EXCEPTIONS PRÉLIMINAIRES DANS LA PROCÉDURE DE LA COUR INTERNATIONALE* (1967); MAARTEN BOS, *LES CONDITIONS DU PROCÈS EN DROIT INTERNATIONAL PUBLIC* (1957); J.C. Witenberg, *La Recevabilité des Réclamations devant les Juridictions Internationales*, 41 *RECUEIL DES COURS* 5 (1932). At the WTO, preliminary objections have the potential to stop proceedings. In *Mexico—Corn Syrup*, Mexico asked the Appellate Body to reverse the substantive findings of the panel based on procedural deficiencies identified in the panel process that were allegedly ignored by the panel. Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW (Oct. 22, 2001) [hereinafter Appellate Body Report, *Mexico—Corn Syrup*]. The Appellate Body recognized the potential of Mexico’s claim, but denied it on substantive grounds due to Mexico’s failure to raise those deficiencies as “objections.” *Id.* ¶¶ 47–50. Note also that preliminary defences that fall outside the terms of reference have the effect, if accepted, of precluding findings of merit in the same panel proceedings concerning such claims. See, e.g., Panel Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 7.32, WT/DS269/R (May 30, 2005).

54. The panel in *Soft Drinks* stated, in relation to Mexico’s request for a preliminary ruling on the question of the propriety of exercising jurisdiction,

Nothing in the DSU, or in the Panel’s working procedures, required the Panel to address Mexico’s request in a preliminary ruling. Instead, the Panel could have waited to rule on the request until its final report. It was the Panel’s opinion, however, that both the parties and the panel proceeding were better served by an early ruling on the request. Had it been appropriate for the Panel to decline to exercise its jurisdiction, *an early decision to this effect would have saved time and resources*. On the other hand, if the Panel—as in the event it did—rejected Mex-

and admissibility are both part of the universe of preliminary questions that, while leaving the merits of the case untouched, have the potential to prevent or postpone a final judgment on the merits.

The difference between jurisdiction and admissibility is a feature of the general international law of adjudication. Besides the ICJ, the European Court of Human Rights<sup>55</sup> (ECHR) and arbitral tribunals have also made this distinction. For example, in *SGS v. Philippines*,<sup>56</sup> the tribunal found that it did have *jurisdiction* to consider a contractual claim under the so-called “umbrella clause” of the bilateral investment treaty at issue.<sup>57</sup> The tribunal, however, declined to exercise this jurisdiction, concluding that the claim was not *admissible* because of a forum clause in the contract stating that contractual claims must be brought to domestic courts.<sup>58</sup> Importantly, neither the ICJ Statute,<sup>59</sup> nor the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States<sup>60</sup> (ICSID Convention) (under which *SGS v. Philippines* was decided)

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ico’s request, an early decision would allow the parties to concentrate on the other aspects of the dispute.

Panel Report, *Mexico–Soft Drinks*, *supra* note 3, ¶ 7.2 (emphasis added). The PCIJ Statute and original Rules of Court also did not foresee preliminary objections at all. See generally Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 390; Rules of Court, 1922 P.C.I.J. 1 (ser. D) No. 1. Notwithstanding the lack of explicit regulation, the Court dealt with those objections ever since the first cases. For example, in *Mavrommatis Palestine Concessions*, the Court noted:

Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court’s jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.

*Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 16 (Aug. 30); see also *Certain German Interests in Polish Upper Silesia* (F.R.G. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6, at 19 (Aug. 25).

55. Article 35 of the European Convention of Human Rights and Fundamental Freedoms, entitled “Admissibility criteria,” lists, *inter alia*, the exhaustion of domestic remedies, anonymity of application, previous related actions and applications that are manifestly ill-founded or an abuse of the right of application. Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

56. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID (W. Bank) Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 113–119 (2004).

57. *Id.* ¶¶ 113–129.

58. In other words, the tribunal regarded forum clauses (analogous to NAFTA Article 2005 at issue in *Soft Drinks*) not as an obstacle or legal impediment to jurisdiction, but as an obstacle or legal impediment to admissibility. See *id.* ¶¶ 136–155.

59. The ICJ has recognized objections to admissibility as such in the exercise of its *compétence de la compétence*, when it has felt it necessary. See, e.g., *Panevezys-Saldutiskis Railway* (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28). It is on the basis of this practice that the current ICJ Rules of Court, drawn by the judges themselves, do make the distinction. See International Court of Justice, Rules of Court art. 69 (1978) (amended 2005) [hereinafter ICJ Rules of Court].

60. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

explicitly includes the distinction between jurisdiction and admissibility. The DSU does not contain this distinction either, but that alone is not a reason to disregard the distinction out of hand. In fact, the dichotomy between jurisdiction and admissibility is embedded in the separation between the authority of the tribunal (determined by its own constitutive instruments—jurisdiction) and the more general procedural relationship between the parties (determined by the set of legal norms binding on them—admissibility). The development of this distinction before the ICJ, and its spillover to the ECHR and arbitral tribunals, indicates that there is a more general role for it in international dispute settlement. Analogously, in our view, the distinction between jurisdiction and admissibility should also be applied in WTO dispute settlement.

The distinction between matters of jurisdiction and admissibility stems from the distinction between the *scope* of a tribunal's decisional authority and the conditions governing the exercise of the *specific action or process* before the tribunal. As is well known, one's right of action does not depend on the fact that a tribunal would uphold the claims made. In other words, action and process are independent from the ultimate merits of the claim.<sup>61</sup> Moreover, action and process have their own conditions independent not only from the question of merit of the substantial claims, but also from the question of jurisdiction of the tribunal. Consequently, notwithstanding a tribunal's jurisdiction to decide a case, and despite the possible merit of the claims made, there may be circumstances that represent "legal impediments"—to use the words of the Appellate Body in *Soft Drinks*—to proceed to a ruling on the merits.<sup>62</sup> Carefully monitoring these circumstances and legal impediments is all the more important if jurisdiction is compulsory, as it is in the case of WTO adjudicative bodies. Indeed, the problem of a defective action is minimized in cases in which parties jointly and explicitly agreed to resort to adjudication in a specific dispute. By contrast, in a situation of compulsory jurisdiction, the floodgates for complaints are open and the impartial adjudicator is the only gatekeeper ultimately responsible for guaranteeing respect for the integrity of the action and the process.<sup>63</sup>

The analysis of conditions or legal impediments for a specific action—that is, the question of *admissibility* of a request—is particularly well devel-

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61. See also Gaetano Morelli, *La Théorie Générale du Procès International*, in 61 RECUEIL DES COURS III 253, 363 (1937) "L'action doit être conçue, dans l'ordre international, comme un pouvoir juridique non seulement autonome, mais même abstrait. Elle ne se confond pas avec l'éventuel droit subjectif en contestation et elle n'est pas subordonnée à l'existence du droit subjectif." *Id.* (The action should be understood, in the international order, like a legal power that is not only autonomous, but even abstract. It should not be confused with the prospective subjective law in question and it is not subordinated to the existence of subjective law.).

62. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 1, ¶ 44.

63. See generally Cuniberti, *supra* note 24 (discussing the role of consent in minimizing the problem of forum shopping). Conversely, the problem is amplified where consent is given *ex ante*.

oped before the ICJ.<sup>64</sup> Thus, the ICJ may have jurisdiction to decide the substance of a claim and yet be unable to decide it because the action or complaint is inadmissible.<sup>65</sup> The ICJ in the *Oil Platforms* case explained the notion as follows:

Objections to admissibility [(*recevabilité*)] normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.<sup>66</sup>

Objections to jurisdiction and objections to admissibility are similar in that they are both preliminary. They are analyzed before the merits and their intended effect is to avoid findings on the merits. However, they are different on at least four accounts. First, as explained above, objections to jurisdiction are primarily directed to the authority of the court to rule on the claims (i.e., the court's competence or *field-jurisdiction* as defined below).<sup>67</sup> Objections to admissibility, in contrast, are targeted at the conditions for the specific action or complaint.<sup>68</sup> As a result, objections to admissibility often come into play only after a finding of jurisdiction.<sup>69</sup>

Second, whereas the governing law of jurisdictional objections refers to the tribunal's jurisdictional field (*ratione materiae* or *ratione personae*, in the case of WTO disputes set out in the DSU and the panel's terms of reference), objections to admissibility are governed by principles and rules binding on the parties to the dispute and not necessarily incorporated in the clause or instrument granting the tribunal jurisdiction.<sup>70</sup> As such, an

64. See CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 245-308 (2003); FITZMAURICE, *supra* note 13, 438-40. See generally *supra* note 51.

65. Examples of legal impediments that make a complaint inadmissible before the ICJ are the nationality of the claimant, non-exhaustion of local remedies, and undue delay. See, e.g., *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 5, 25-26 (Mar. 21); *Nottebohm* (Liech. v. Guat.), 1953 I.C.J. 111, 123 (Nov. 18); *Ambatielos* (Greece v. U.K.), 1952 I.C.J. 28, 43-44 (July 1); see also *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Summary 2007/3 I.C.J. (May 24), available at <http://www.icj-cij.org/docket/files/103/13857.pdf>.

66. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 177 (Nov. 6).

67. See *infra* notes 80-85.

68. Article 79.1 of the ICJ Rules of Court highlights that jurisdiction relates to the Court, and admissibility relates to the application: "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application . . ." ICJ Rules of Court, *supra* note 59, art. 79.1 (emphasis added).

69. Theoretically, objections to admissibility should come into play only after jurisdiction is established. See, e.g., *Armed Activities on the Territory of the Congo* (New Application 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 4, 17, 52 (Feb. 3). Note, however, that there have been cases in which a claim has been found to be inadmissible while the objections to jurisdiction had not been thoroughly disposed of. See, e.g., *Interhandel*, 1959 I.C.J. at 8-9.

70. See *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15, 102-03 (Dec. 2) (separate opinion of Judge Fitzmaurice).

[T]he real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such

objection to admissibility leaves untouched the jurisdiction of the court to decide the case. In fact, if a tribunal refuses to examine substantive claims based on their inadmissibility, the court is, by definition, *exercising jurisdiction*, albeit to decline to rule on the merits of the case. Hence, the question of a panel being *deprived of jurisdiction* based on an outside treaty or principle does not arise. Rather, what a panel does in these cases is to *exercise its jurisdiction* (albeit *incidental jurisdiction* as defined later)<sup>71</sup> so as to recognize the *inadmissibility* of the action and stop the proceeding without findings on the merits.

Third, qualifying an objection as a matter of jurisdiction or admissibility is important for the purpose of establishing the burden to raise such an objection. Lack of jurisdiction is an issue that a tribunal must examine at its own initiative.<sup>72</sup> In contrast, the question of admissibility of claims normally has to be raised by the parties.<sup>73</sup> This distinction relates to the very nature of the lack of jurisdiction versus the inadmissibility of a claim. As lack of jurisdiction concerns the scope of the tribunal's authority to decide the issue, the tribunal must sort this out for itself, even if neither party raises the question.<sup>74</sup> Inadmissibility, however, relates to the specific application and centers on the legal relationship between the parties; for example, must the complainant first exhaust domestic remedies or, conversely, has the complainant previously waived or exhausted its right to bring a case? In this sense, the analysis of admissibility is subject to implied waiver

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a provision, then it will normally be an objection to the receivability of the claim

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*Id.*

71. See *infra* notes 86-90.

72. A WTO panel "is entitled to consider the issue of its own jurisdiction *on its own initiative*, and to satisfy itself that it has jurisdiction in any case that comes before it." Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, ¶ 54 n.30 (Aug. 28, 2000) [hereinafter Appellate Body Report, *Anti-Dumping Act of 1916*] (emphasis added); see also *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 15, 18 (Oct. 2, 1995), in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998, at 33, 40-41 (André Klip & Göran Sluiter eds., 1999) [hereinafter *Tadić* Defence Motion]. What is more, "[P]anels cannot simply ignore issues which go to the root of their jurisdiction . . . . Rather, panels *must* deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed." Appellate Body Report, *Mexico—Corn Syrup*, *supra* note 53, ¶ 36 (emphasis added); see also *Border and Transborder Armed Actions (Nic. v. Hond.)*, 1988 I.C.J. 69, 76 (Dec. 20); *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 432, 450 (Dec. 4) ("[T]here is no burden of proof to be discharged in the matter of jurisdiction.").

73. See Appellate Body Report, *Mexico—Corn Syrup*, *supra* note 53, ¶ 53 (drawing a distinction between issues that could deprive the panel of its "authority" and that "the Panel was bound to address [on] its own motion" and issues that the parties should raise); see also AMERASINGHE, *supra* note 64, at 286. Notice, however, that the authority to examine issues of admissibility *ex officio* may also be expressly granted by the governing instruments of the tribunal. See, e.g., ECHR, *supra* note 55, art. 35.4.

74. Note, however, that in the context of the ICJ's ad hoc consent-based jurisdiction, a party who wishes to contest jurisdiction should raise the issue, given the potential operation of the doctrine of *forum prorogatum*. See generally Sienho Yee, *Forum Prorogatum in the International Court*, 42 GERMAN Y.B. INT'L L. 147 (1999).

and acquiescence by the other party.<sup>75</sup> Thus, depending on whether one qualifies *res judicata*, *lis pendens*, *forum non conveniens*, or forum-election clauses in outside treaties as relating to the admissibility of a claim or to the jurisdiction of a tribunal, parties must raise the objection (admissibility) or the tribunal must consider them at its own initiative (jurisdiction). This difference may explain the Appellate Body's attitude in *Soft Drinks* in which it did not examine NAFTA's fork-in-the-road clause in any detail arguably on the ground that Mexico explicitly refused to rely on this NAFTA clause.<sup>76</sup> Had the Appellate Body considered this clause to be a matter of its own jurisdiction, it could have examined the clause even if Mexico did not invoke it. Because the clause relates, in our view, to admissibility, and Mexico therefore should have invoked it, we believe that the Appellate Body correctly decided not to further examine the NAFTA clause.

Fourth, and related to the question of waiver and acquiescence, a decision on inadmissibility does not acquire the full force of *res judicata* when the problem underlying the admissibility of the application may be cured. In contrast, a decision on jurisdiction cannot be cured unilaterally and to this extent does carry the force of *res judicata*. A decision of inadmissibility based on the non-exhaustion of local remedies, for instance, does not influence further proceedings after local remedies have been exhausted. A decision proclaiming the inadmissibility of a WTO-complaint based on the inadequacy of consultations, likewise, should not preclude the complainant from making the same request under the same cause of action in new proceedings after proper consultations have taken place. In this sense, a decision on inadmissibility would not have the force of *res judicata*.

The notion of admissibility also sheds new light on the broader debate of jurisdictional overlap among international tribunals. Recognizing that principles such as *res judicata* and forum-selection clauses are questions of admissibility of the request (not questions of jurisdiction of the respective tribunals) shifts the discussion away from a "clash of legal regimes"<sup>77</sup> or "conflicts of law/conflicts of jurisdiction" perspective. Instead, it frames the question in terms of an assessment of the legal conditions linked to the specific action or complaint before a particular tribunal. Previous works have centred on the role of non-WTO law in the jurisdictional stages of WTO disputes through the lens of conflicts of laws<sup>78</sup> and conflicts of juris-

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75. See Appellate Body Report, *Mexico—Corn Syrup*, *supra* note 53, ¶ 50 (stating that "[a] Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections"); see also *id.* ¶ 64 ("[A] lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority . . . and that, accordingly, such a defect is not one which a panel must examine even if both parties remain silent thereon.").

76. See Cámara Nacional Amicus Brief, *Mexico—Soft Drinks*, *supra* note 48, ¶ 19.

77. See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); see also Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 574 (2002).

78. See, e.g., JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

diction.<sup>79</sup> As a result, the question of jurisdictional coordination has revolved around the possibility of bilateral derogation from WTO rules and rules of conflict such as *lex specialis* and *lex posterior* (i.e., is the NAFTA fork-in-the-road clause more specific or later in time than the DSU's jurisdictional clause in Article 23?). In contrast, under the framework sketched above, forum-election clauses in outside treaties or general principles of coordination apply procedurally to preclude a *party* from resorting to WTO dispute settlement on the grounds that the *claims* become inadmissible, not on the grounds that there is a conflict of norms or jurisdiction *between tribunals* or *treaty-regimes* which plays out in favour of the non-WTO treaty and undermines the panel's jurisdiction. Indirectly, through the notion of inadmissibility, those rules and principles provide a panel with the basis to refrain from deciding a case irrespective of whether bilateral modifications affect the jurisdiction of panels. Indeed, under the analysis of admissibility, both the jurisdiction of the panel (field-jurisdiction) and the substantive rights of the complainant remain untouched. As a result, the thorny problem of conflict of laws or jurisdiction, at least the way it has been framed so far, simply does not come into play. Faced with inadmissible claims, a panel *exercises jurisdiction* (albeit incidental jurisdiction) if only not to rule on the substantive claims before it.

The concept of jurisdiction, as applied to international tribunals, has at least three different meanings. First, in its broadest sense, jurisdiction (from the Latin *jurisdictio* or *jus dicere*, literally "speak the law") describes the *power* of a tribunal to state the law on a particular issue (hereinafter *power-jurisdiction*). This power is defined by two spheres of jurisdiction. The narrower sphere determines the *class of cases* a tribunal has the power to decide. It can be referred to as a tribunal's "jurisdictional field,"<sup>80</sup> "jurisdiction in a field sense,"<sup>81</sup> or also "substantive," "original," or "primary" jurisdiction<sup>82</sup> (hereinafter *field-jurisdiction*). "Competence" is another term that describes this field-jurisdiction of a tribunal, particularly in the French language, and is referred to there as *compétence*.<sup>83</sup> The scope of field-jurisdiction is crucial in international law, as it is generally recognized that an international tribunal only has field-jurisdiction where such jurisdiction was explicitly granted to it by the parties (i.e., international tribunals are tribunals of specific jurisdiction). Thus, in the WTO context, the field-jurisdiction of adjudicative bodies is limited, first, to disputes under WTO covered agreements<sup>84</sup> and, second, to the terms of reference of the specific panel.<sup>85</sup> Consequently, a panel's ultimate "recommendations" on compliance or violation in a given dispute between WTO members must fall under the WTO covered agreements and within the specific

79. See Kwak & Marceau, *supra* note 40, at 465.

80. FITZMAURICE, *supra* note 13, at 434.

81. *Id.*

82. See, e.g., *Tadić* Defence Motion, *supra* note 72, ¶ 17.

83. See ABI-SAAB, *supra* note 53, at 60.

84. See DSU art. 1.1.

85. See *id.* art. 7.

panel's terms of reference. These are the limits to be applied in an objection to field-jurisdiction as defined above.

There is, however, another sphere of jurisdiction which is often referred to as the "incidental"<sup>86</sup> or "inherent"<sup>87</sup> jurisdiction of international tribunals (hereinafter *incidental jurisdiction*). This type of jurisdiction can also be called interlocutory jurisdiction because it refers to questions intervening before the end of proceedings that are decisive to some point or matter, but are not a final decision of the whole controversy.<sup>88</sup> Incidental jurisdiction is asserted when an international tribunal faces a question that affects its ability to exercise the judicial function assigned to it. This sphere of jurisdiction guarantees that a tribunal maintains the integrity of its judicial function<sup>89</sup> in exercising the limited field-jurisdiction granted to it.<sup>90</sup> To decide, for example, on preliminary objections to either jurisdiction or admissibility, a tribunal must exercise incidental jurisdiction. Since, with regard to objections to jurisdiction, the very question is whether the tribunal has field-jurisdiction in the first place, a preliminary decision on jurisdiction cannot possibly be an exercise of field-jurisdiction (hence the notion of *kompetenz-kompetenz* or *la compétence de la compétence*).

The distinction between field-jurisdiction and incidental jurisdiction is graphically represented here. Based on this distinction, the field-jurisdiction of WTO panels (circumscribed by WTO covered agreements and a panel's terms of reference) must be distinguished from the incidental jurisdiction of WTO panels (inherently held by all judicial decisionmakers).

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86. See, e.g., *Tadić* Defence Motion, *supra* note 72, ¶ 17; see also Herbert W. Briggs, *The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction*, in *VÖLKERRECHT UND RECHTLICHES WELTBILD: FESTSCHRIFT FÜR ALFRED VERDROSS* 87 (K. Zemanek ed., 1960).

87. *Tadić* Defence Motion, *supra* note 72, ¶ 14.

88. See BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

89. As Kenneth Carlston observed:

A State, in submitting its dispute with another to the decision of an international tribunal, has certain fundamental rights which it may expect in full confidence will be respected. . . . The tribunal must respect the law governing its creation and defining its powers as laid down in the *compromis*, and it must likewise observe certain other established rules of a fundamental character which inherently, under the generally accepted rules of law and justice, regulate the conduct of any judicial body.

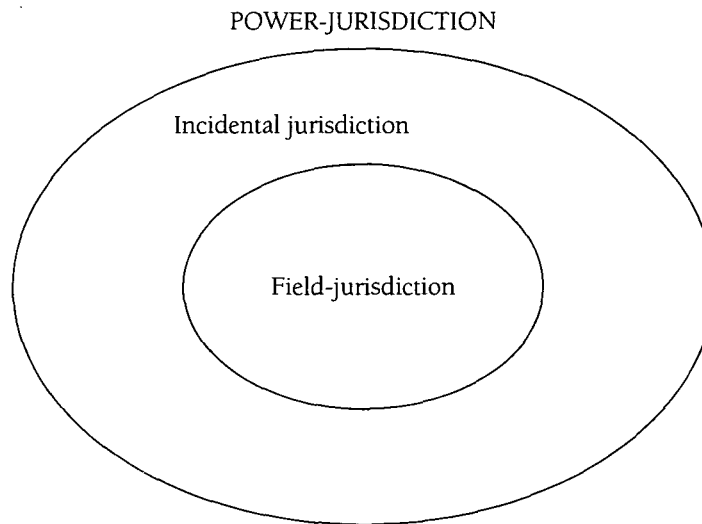
KENNETH S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 36 (1946) (emphasis added).

90. Notice, for example, the ICJ's limited field-jurisdiction in the *Namibia* opinion and in the *Lockerbie* case. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 45 (June 21) [hereinafter *Legal Consequences for Namibia*]; see also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 130-31 (Feb. 27) [hereinafter *Aerial Incident at Lockerbie*]. In both cases, although the ICJ had undoubtedly no power to judicially review resolutions of United Nations organs, it assessed those resolutions as a matter of course, in the exercise of its judicial function, in order to decide on the merits of the cases which were under its field-jurisdiction. See *Aerial Incident at Lockerbie*, 1998 I.C.J. at 130-31; *Legal Consequences for Namibia*, 1971 I.C.J. at 45.



Notice the Appellate Body's agreement with Mexico in *Soft Drinks* that "WTO panels have certain powers that are inherent in their adjudicative function."<sup>91</sup> These powers are not set out in the WTO covered agreements, nor are they normally within a panel's explicit terms of reference. They are inherent in the judicial function,<sup>92</sup> and their existence reveals that the power-jurisdiction of panels (as defined earlier) expands beyond their field-jurisdiction—namely, it includes both field and incidental jurisdiction.

Figure 1. Distinction Between Field-Jurisdiction and Incidental Jurisdiction



One notable example of power-jurisdiction exercised incidentally is the doctrine of *la compétence de la compétence*, which is well recognized in the WTO.<sup>93</sup> But the incidental jurisdiction of panels is broader than *la compétence de la compétence*. For instance, as the Appellate Body has confirmed, "as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by

91. Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 45 (emphasis added).

92. See also Isabelle Van Damme, *Inherent Powers of and for the WTO Appellate Body* (Aug. 2008) (Working Paper), available at <http://www.graduateinstitute.ch/webdav/site/ctei/shared/CTEI/publications/CTEI%20Working%20Papers/WPCTEI-InherentPowersAB29Aug.doc>.

93. "Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction." See Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 45; see also Nottebohm (*Liech. v. Guat.*), 1953 I.C.J. 111 (Nov. 18); Appellate Body Report, *Anti-Dumping Act of 1916*, *supra* note 72, ¶ 30; *Rio Grande Irrigation & Land Co., Ltd. (Gr. Brit. v. U.S.)*, 6 R. Int'l Arb. Awards 131, 135–36 (1923).

parties to a dispute.”<sup>94</sup> This dictum fits squarely with incidental jurisdiction as defined above. More recently, the panel ruling on *US–Hormones Suspension*<sup>95</sup> provided yet another example of incidental jurisdiction as broader than field-jurisdiction, this time not focused as much on preliminary or procedural questions (for example, under objections to jurisdiction or admissibility), but on questions related to substance. In that ruling, the panel determined that in order to decide the EC’s claim that the United States violated DSU Article 22.8 (in other words, whether the U.S. suspension should continue after the inconsistent measure was removed), it was necessary to examine issues under the SPS Agreement<sup>96</sup>—namely whether the new EC measure complied with the SPS Agreement.<sup>97</sup> These issues were flagrantly outside the panel’s terms of reference or field-jurisdiction, but, in our view, perfectly within the panel’s incidental jurisdiction.<sup>98</sup> Hence, incidental or interlocutory questions trigger the tribunal’s power-jurisdiction to consider law (in that case, the SPS Agreement) which may not strictly fall within the panel’s field-jurisdiction (here, the WTO covered agreements or a panel’s terms of reference). The same would be true when a panel decides the admissibility of claims before it and is, in this incidental exercise, called upon to refer to a forum clause in an outside treaty such as NAFTA. Even if NAFTA clearly does not fall within a WTO panel’s field-jurisdiction, a WTO panel may be called upon to consider it in the exercise of the panel’s incidental jurisdiction (in its decision on whether a WTO complaint is admissible).

In sum, the notion that a WTO panel can never decline to exercise its jurisdiction rests on a confusion between a panel’s field-jurisdiction and its incidental jurisdiction. The yardsticks of a panel’s field-jurisdiction are, as the United States and China argued in *Soft Drinks*, DSU Article 1.1 and the panel’s terms of reference.<sup>99</sup> These are the signposts of a panel’s authority to make substantive findings of compliance or violation. Conversely, incidental jurisdiction is inherent in the judicial function and dependent on

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94. Appellate Body Report, *Mexico–Corn Syrup*, *supra* note 53, ¶ 36 (emphasis added).

95. Panel Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, WT/DS320/R (Mar. 31, 2008) [hereinafter Panel Report, *US–Continued Suspension*].

96. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

97. See Panel Report, *US–Continued Suspension*, *supra* note 95, ¶ 6.54, upheld in Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, ¶¶ 322–332, 736, WT/DS320/AB/R (Oct. 16, 2008).

98. *Id.* ¶ 7.276.

[W]e want to stress that in reviewing the EC claims of violation of Article 23.1 read together with Article 22.8 and Article 3.7 of the DSU, our intention is not to substitute ourselves for a compliance panel under Article 21.5 of the DSU. We will make findings with respect to the second series of main claims of the European Communities with the only purpose to reach a conclusion on the violation of the provisions referred to in those claims.

*Id.*

99. See Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 43.

the opposing arguments raised by both parties. It includes those preliminary and incidental issues that a panel must assess before definitively deciding the merits of the case. Hence, unlike what the United States and China were implying in *Soft Drinks*, the fact that a panel or the Appellate Body has field-jurisdiction in a specific case does not mean that it must necessarily make a ruling on the merits. Notwithstanding this field-jurisdiction, legal impediments, such as a forum-selection clause in NAFTA, can make the specific claim inadmissible and thereby can prevent the panel or Appellate Body from making a ruling on the merits. However, the fact that the field-jurisdiction of a WTO panel is limited (i.e., only provisions in WTO covered agreements are included in the panel's terms of reference), does not speak to a panel's incidental jurisdiction or the possibility that a WTO panel may have to consider treaty provisions outside its field-jurisdiction when exercising incidental jurisdiction (be it a NAFTA clause or, in *US–Hormones Suspension*, SPS provisions).

#### IV. Why Domestic Analogies Do Not Work in the International Context

##### A. *Res Judicata*

With the difference between jurisdiction of a tribunal and admissibility of a claim explained, let us now revert to the relevance and possible impact of domestic law principles to deal with forum shopping on an international scale. First, *res judicata*—a preclusion doctrine dealing with sequential proceedings—is generally considered a principle that is also applicable before international tribunals.<sup>100</sup> Under the framework outlined above, *res judicata* is a legal impediment precluding sequential claims; in other words, it relates to admissibility, not field-jurisdiction. Most importantly, if the criteria for *res judicata* are met, the tribunal does not have any discretion to decide the case, making the principle a preclusion rather than an abstention doctrine, as were defined earlier.<sup>101</sup>

The reluctance of WTO panels and the Appellate Body to apply the principle of *res judicata* is difficult to understand.<sup>102</sup> If the Appellate Body

100. See Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) ¶¶ 115–120 (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>; see also *Petrobart Ltd. v. Kyrgyz Republic*, Arb. No. 126/2003 55 (Arb. Inst. of the Stockholm Chamber of Commerce 2005); *Waste Mgmt., Inc. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/00/3, ¶ 39 (NAFTA Ch. 11 Arb. Trib. 2004), 43 I.L.M. 967, 972 (2004). See generally LEONARDO NEMER CALDEIRA BRANT, *L'AUTORITÉ DE LA CHOSE JUGÉE EN DROIT INTERNATIONAL PUBLIC* (2003); *Judicial Decisions Involving Questions of International Law: Protocol of an Agreement Between the United States and the Republic of Mexico for the Adjustment of Certain Contentions Arising Under What is Known as "The Pious Fund of the Californias"*, 2 AM. J. INT'L L. 893, 900 (1908); Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT'L & COMP. L. 38 (1996).

101. See *supra* notes 33–35 and accompanying text.

102. See Panel Report, *India—Measures Affecting the Automotive Sector*, ¶¶ 7.57–7.59, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) [hereinafter *India—Autos*] (considering that there is neither textual nor case-based clear guidance on the applicability of the doctrine, because “many important interpretative issues would thus need to be consid-

decides to apply judicial principles on burden of proof, good faith, and due process—on which nothing is explicitly said in the DSU—there is no reason for it to reject the principle of *res judicata*.<sup>103</sup> The WTO reluctance to apply the principle of *res judicata* is all the more surprising because *res judicata* is only rarely triggered in international litigation. Put differently, if it is only rarely triggered what is the WTO afraid of?

It is, indeed, commonly acknowledged that *res judicata* only applies if (1) the parties are the same, (2) the object or subject matter (*petitum*) is the same, and (3) the cause of action (*causa petendi*) is the same.<sup>104</sup> The third condition most often means that an earlier ruling by one international tribunal will not constitute *res judicata* for another. This is so because of the treaty-based, category-specific nature of the jurisdiction of most international tribunals, referred to earlier. For example, if the International Tribunal for the Law of the Sea (ITLOS) previously decided a dispute, the admissibility of the claims in a subsequent WTO panel between the same parties and on the same factual background will most likely not be precluded by the earlier ITLOS decision. The *causa petendi* before ITLOS will be a claim under the United Nations Convention on the Law of the Sea<sup>105</sup> (UNCLOS) and before the WTO it will be a claim under a WTO agreement. Similarly, even if a NAFTA panel decided earlier that a given tax violated national treatment, this decision might not, strictly speaking, trigger the preclusive effects of *res judicata* for a subsequent WTO panel even between the same parties on the same tax, because the *causa petendi* before the WTO is the WTO obligation to provide national treatment. Before the NAFTA panel, however, the *causa petendi* was the NAFTA obligation of national treatment.<sup>106</sup>

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ered in determining whether the doctrine of *res judicata* applies in WTO dispute settlement”).

103. But see Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, ¶ 93, WT/DS141/AB/RW (Apr. 8, 2003) (confirming, at least implicitly, the *res judicata* effect of unappealed panel reports adopted by the DSB).

[I]n our view, an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim.

*Id.* The Appellate Body thereby also confirmed the three pre-conditions for the *res judicata* effect to be triggered: (1) same parties; (2) same object matter (“specific component of a measure”); and (3) same cause of action or claim. See *id.* The Appellate Body equally confirmed the binding effect as between the parties of its own reports once adopted by the DSB. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 92–96, WT/DS58/AB/R (Oct. 12, 1998).

104. Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), 1927 P.C.I.J. (ser. A) No. 11, at 23–24 (Dec. 16) (dissenting opinion of Judge Anzilotti); *India—Autos*, *supra* note 102, ¶ 7.65; see also SHANY, THE COMPETING JURISDICTIONS, *supra* note 14, at 22–23.

105. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

106. *MOX Plant Case (Ir. v. U.K.)*, Request for Provisional Measures, No. 10, ¶ 51 (Int’l Trib. L. of the Sea 2001), 41 I.L.M. 405, 413 (2002) (“[T]he application of international law rules on interpretation of treaties to identical or similar provisions of different

In the *Soft Drinks* dispute, the Appellate Body saw no problem exercising jurisdiction to decide the merits of the claims by the United States, even though Mexico had earlier brought a claim to NAFTA, because, *inter alia*, “neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA . . . and the dispute before us.”<sup>107</sup> Before NAFTA, Mexico was complaining about U.S. quotas, while before the WTO, it was the United States that was complaining about a Mexican tax.<sup>108</sup>

In the current context of international law, where jurisdiction and cause of action are intimately linked, applying *res judicata* to deal with overlaps between *different* international tribunals will, therefore, mostly be a waste of time. The cause of action will be different and the doctrine thus will not be triggered. In those cases, *res judicata* is at best a fig leaf allowing the tribunal to go ahead and decide the case anyway; at worst, it is false judicial deference or comity. The tribunal gives the impression that it has an open mind and is ready to apply general principles, yet it knows beforehand that these general principles will not apply and will not stop it from deciding the case.

This situation could, however, change if tribunals were willing to soften the three criteria for *res judicata* to apply. To do so they could borrow from common law notions such as “issue estoppel” or civil law notions such as “related actions.”<sup>109</sup> Tribunals could also define the “same parties” broadly as some investor-state awards have done, albeit to expand, rather than to decline to exercise, their jurisdiction.<sup>110</sup> In the current con-

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ventions may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.”); see also Panel Report, *Argentina–Poultry*, *supra* note 22; *Petrobart Ltd. v. Kyrgyz Republic*, Arb. No. 126/2003 (Arb. Inst. of the Stockholm Chamber of Commerce 2005) (refusing to apply *res judicata* in an Arbitral Tribunal operating under the Stockholm Arbitration Institute to domestic proceedings in both a Kyrgyz Court and an UNCITRAL arbitration). Regarding the difference between national treatment in trade and investment agreements, see Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48 (2008).

107. Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 54 (quoting Panel Report, *Mexico–Soft Drinks*, *supra* note 3, at ¶ 7.14).

108. *Id.* ¶ 54 n.107. Granted, because there was no previous decision by a NAFTA panel, one of the conditions for the application of *res judicata* would not have been met anyway. Nevertheless, the discussion remains relevant for the question of *lis pendens*. See also Panel Report, *Argentina–Poultry*, *supra* note 22, ¶¶ 7.28, 7.33 n.53 (refusing to consider *res judicata* even though the same measure at issue had been previously found legal under MERCOSUR).

109. *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, [1967] 1 A.C. 853, 935 (H.L.) (emphasizing that the doctrine of “issue estoppel” in common law systems is neighbour to the notion of *res judicata* but does not require the “same cause of action”); see also *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). For the doctrine of “related actions,” see *infra* notes 163–167.

110. Some investment tribunals have applied the “same parties” requirement broadly to assert jurisdiction over claims. See, e.g., *Dow Chem. Fr. v. Isover Saint Gobain*, 110 J. DU DROIT INT’L 899 (1983), *reprinted in* 9 Y.B. COM. ARB. 131, 136 (1984) (“[I]rrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the tribunal

text of international law it may, however, be difficult and risky to apply more lax criteria for *res judicata* for two reasons. First, is difficult to distill true “general principles” to this effect. Rules on “related actions” are, for example, only applied when explicitly provided for, they are not a self-standing doctrine or principle. Second, even where actions are “related”—for example, national treatment in NAFTA and the WTO—the origin, objectives, and institutional contexts of these related actions may still be different and, therefore, it may be unwise for one decision to legally preclude another.<sup>111</sup> This should not, however, prevent softer means of judicial deference. That said, in exceptional cases, doctrines such as good faith, estoppel, or abuse of process could be applied to curb genuinely abusive sequential litigation.<sup>112</sup>

Finally, if one qualifies *res judicata* as undermining the tribunal’s very jurisdiction to decide the case, the tribunal must consider the principle at its own initiative. If, in contrast, *res judicata* relates to admissibility (or the application or complainant and not the tribunal as such), a position that conforms to the framework offered above and that we find more convincing (at least in the current context of international law),<sup>113</sup> the tribunal must only consider *res judicata* if either party invokes it.<sup>114</sup> Put differently, in our view, *res judicata* relates to the admissibility of the claim, not the jurisdiction of the tribunal.

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should take account . . . .”); *Amco Asia Corp. v. Indonesia*, ICSID (W. Bank), Case No. ARB/81/1, Decision on Jurisdiction (1983), reprinted in 10 Y.B. COM. ARB. 61, 66 (1985) (“P.T. Amco was but an instrumentality through which Amco Asia was to realize the investment. Now, the goal of the arbitration clause was to protect the investor. . . . [W]ould it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?”); *Klöckner v. Cameroon*, 2 ICSID Rep. 9, 17 (1983) (“This Agreement, although formally signed by the Government and SOCAME, was in fact negotiated between the Government and Klöckner . . . . [I]t is undeniable that it was manifestly concluded in the interest of Klöckner . . . .”). Reinisch argues that this argument should work both ways: tribunals should also interpret the “same parties” criterion broadly so as to decline jurisdiction. August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW & PRAC. INT’L CTS. & TRIBUNALS 37, 57–77 (2004).

111. See *supra* note 106.

112. See Lowe, *supra* note 18, at 191.

113. Indeed, if an issue is to be examined by the tribunal at its own initiative, it should logically be something that the tribunal can examine relatively easily by looking at the constituent documents that confer jurisdiction on the tribunal. In contrast, in the current context of widely diverse and loosely integrated international courts and tribunals, the fact that another tribunal has already decided the dispute is not normally something that a second tribunal can find out for itself without the parties bringing the issue to the tribunal’s attention. Hence, if only for purely practical reasons, *res judicata*, in the current international law context, would seem to relate more to the application or earlier conduct by the complainant, rather than to the very jurisdiction of the tribunal itself.

114. Consider Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which lists the situation of an application that “is substantially the same as a matter that has already been examined by the Court,” that is, an extended version of *res judicata* as a question of admissibility, not jurisdiction. ECHR, *supra* note 55, art. 35.

## B. *Lis Pendens*

Whereas *res judicata* no doubt applies to international tribunals, it is more controversial whether the same is true for *lis pendens*, a preclusion doctrine dealing with parallel, rather than sequential, proceedings. Professor August Reinisch argues that *lis pendens* applies in the international context,<sup>115</sup> Professor Gilles Cuniberti submits that it does not,<sup>116</sup> and Dr. Yuval Shany says that the answer is unclear.<sup>117</sup>

Cuniberti supports the view that *lis pendens* is not, nor should be, a principle of international law on two grounds. First, in his view, *lis pendens* is not a "general principle of law" because it is essentially a civil law doctrine.<sup>118</sup> Other legal traditions approach the same problem with very different jurisdictional tools (e.g., the common law principle of *forum non conveniens* or the U.S. courts' abstention doctrines). Incorporating *lis pendens* as a general principle of law into international law without the ancillary doctrines that come with it, such as the civil law rules on "related actions,"<sup>119</sup> would, in Cuniberti's opinion, offer an "incomplete picture."<sup>120</sup> Second, and more importantly, the time factor of *lis pendens*—the court first seized decides the case—makes sense between hierarchically equal and similarly expert and legitimate domestic courts. It does not make sense among international courts that are not necessarily comparable, be it for reasons of hierarchy, procedural efficiency, legitimacy, or expertise. To apply, in those circumstances, the guillotine approach of "the first court seized decides" is, according to Cuniberti, not appropriate:

[T]he fundamental goal of the institution [of *lis pendens*] has been to discriminate between adjudicators who were comparable in most respects. As it would not have been acceptable to find that one given first instance court was superior to or more legitimate than another first instance court of the same country, it was only natural that the institution would ultimately rely on a test that would be as neutral as possible [i.e., a simple time factor] to distinguish between them and designate the one that should retain jurisdiction. In an international setting, however, neither the equality nor the legitimacy of all adjudicators should be assumed. The issue of parallel litigation can therefore be addressed by discriminating between the competing adjudicators on very substantive grounds. . . . [T]he policy decisions behind the *lis pendens* doctrine have no legitimacy to regulate parallel litigation in an international setting.<sup>121</sup>

Although Cuniberti overlooks the fact that, much like between two courts of first instance within the same country, no inherent legal hierarchy exists between international tribunals, on the merits, his arguments

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115. See Reinisch, *supra* note 110, at 48.

116. Cuniberti, *supra* note 24, at 406.

117. See SHANY, *THE COMPETING JURISDICTIONS*, *supra* note 14, at 241.

118. See Cuniberti, *supra* note 24, at 383.

119. See *infra* notes 163–167.

120. See Cuniberti, *supra* note 24, at 412.

121. *Id.* at 383–84.

are convincing.<sup>122</sup> In the current context of international law—particularly given the treaty-based jurisdiction of most international tribunals as well as their diverse institutional and historical context, proceedings, applicable law, remedies, expertise, and legitimacy—it is hard to start from the presumption that *ceteris paribus*—other than the time factor—two international proceedings are “the same” or even “comparable.” On the contrary, to apply the guillotine of time in the brave new world of diverse international tribunals of all colours and stripes could then be rather artificial. Indeed, even Reinisch, who supports application of *lis pendens* by international tribunals, agrees that one of the prerequisites for *lis pendens* is that the two tribunals operate in the same legal order.<sup>123</sup>

Consider, for example, whether the WTO panel should have applied *lis pendens* in *Soft Drinks*. Assuming that NAFTA’s choice of forum provision did not apply, should the WTO panel have dismissed the case in favour of the earlier-initiated NAFTA proceeding? Given the United States’ refusal to appoint a panelist, *lis pendens* would have left the case in limbo. Although it may not be politically correct to posit the superiority of the WTO panel system, it could be argued that, at least in procedural terms, WTO and NAFTA (Chapter 20) panels are not “comparable.” If so, the purely time-based logic of *lis pendens* should not apply. From this perspec-

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122. Moreover, even when it comes to formal, legal hierarchies between tribunals, Cuniberti has a point as his prime example the hierarchical superiority of an *international* tribunal over a *domestic* court. *Id.* at 396–99. Cuniberti refers, with support, to an early P.C.I.J. case which decided that overlapping proceedings before a mixed arbitral tribunal and a Polish domestic court on the one hand and the P.C.I.J. on the other hand cannot trigger *lis pendens* as these are “not courts of the same character.” Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6, at 20 (Aug. 25); see also Cuniberti, *supra* note 24, at 405. Yet, Cuniberti then discovers with dismay that International Centre for Settlement of Investment Disputes (ICSID) tribunals started to disregard this hierarchy and now commonly apply *lis pendens* also to overlap between international (ICSID) proceedings and domestic court or arbitration proceedings, thereby implicitly accepting that the jurisdiction of an ICSID tribunal is comparable to, or of the same hierarchy as, that of a domestic court or tribunal. Cuniberti, *supra* note 24, at 399. In *SGS v. Pakistan*, for example, the ICSID tribunal explicitly considered—but ultimately did not apply—the *lis pendens* doctrine even though the parallel proceeding was one brought before a single ad hoc arbitrator pursuant to the arbitration clause of an investment contract. *SGS Société Générale de Surveillance S.A. v. Republic of Pakistan*, ICSID (W. Bank) Case No. ARB/01/13, Decision on Objections to Jurisdiction, 42 I.L.M. 1290 (2003). See generally *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/97/3 (2007); *Empresas Lucchetti, S.A. v. Republic of Peru*, ICSID (W. Bank) Case No. ARB/03/4 (2005); *Noble Ventures, Inc. v. Romania*, ICSID (W. Bank) Case No. ARB/01/11 (2005); *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID (W. Bank) Case No. ARB/77/2 (1980), 21 I.L.M. 740 (1982). In *Noble Ventures*, the tribunal recognised a difference of order between international and domestic law, but reasoned that the umbrella clause led to an exception to this separation. *Noble Ventures*, ICSID ¶¶ 53–56. But, in contrast to *SGS v. Pakistan*, the tribunal in *SPP v. Egypt* refused to apply *lis pendens* when faced with parallel proceedings before “two unrelated and independent tribunals.” *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (1985), 3 ICSID Rep. 112, 129 (1995).

123. See Reinisch, *supra* note 110, at 52.



tive, it may, therefore, not be appropriate to apply *lis pendens* before both international tribunals in question have matured procedurally.

So much for Cuniberti's arguments against applying *lis pendens* in the international context. What convinced Reinisch to advocate the opposite position?<sup>124</sup> First, Reinisch argues that *lis pendens* is a general principle of law in the sense of Article 38 of the ICJ Statute.<sup>125</sup> In support of his arguments, he points to "[t]he widespread use and similarity of the concept of *lis pendens* in the national procedural laws of States of all legal traditions[,] . . . its inclusion in a number of bi- and multiparty agreements,"<sup>126</sup> and its appearance in a number of international court cases.<sup>127</sup> Second, and more interestingly, Reinisch argues that if international courts and tribunals were to accept the principle of *res judicata*, they would be logically compelled to also accept the principle of *lis pendens*:

As a matter of legal logic it would be inconsistent to permit parallel proceedings between the same parties in the same dispute [i.e., not to apply *lis pendens*] before different dispute settlement organs up to the point where one of them has decided the case and then prevent the other ("slower") one from proceeding as a result of *res judicata*.<sup>128</sup>

Is this necessarily the case? Are there no reasons to let parallel proceedings continue until one proceeding ends and only then demand that the other stop? Of course, such an approach imposes the "extra" cost of letting parallel proceedings continue, but as we saw earlier, cost is not that important an issue (except perhaps for very poor countries and some individuals or small and medium sized corporations).<sup>129</sup>

Cost aside, there may be two additional reasons to apply *res judicata* but not *lis pendens*. First, *res judicata* directly preserves the finality of rulings (*l'autorité de la chose jugée*) and the stability and security of the legal system. Allowing parallel proceedings to continue, in contrast, does not upset any past ruling by another court.<sup>130</sup> Second, as the *Soft Drinks* example illustrates, declining jurisdiction on the ground that another proceeding is pending does not necessarily guarantee that the other proceeding will ultimately resolve the dispute. In the *res judicata* context, by

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124. Reinisch was asked to write a legal opinion in the Czech Republic's case before Swedish courts to set aside the ruling in *CME Czech Republic B.V.*, which found the Czech Republic liable for \$ 269,814,000. See Reinisch, *supra* note 110, at 37. See generally *supra* note 21. Reinisch wrote in favour of the earlier *Lauder* case, which denied all claims against the Czech Republic on the same facts. Reinisch, *supra* note 110, at 37. From that perspective, he may have had an incentive to write in favour of a broad application of *lis pendens* and *res judicata* in the international context.

125. Reinisch, *supra* note 110, at 48.

126. *Id.* at 48.

127. *Id.* at 48-50.

128. *Id.* at 50; see also Gabriele Salvioi, *Problèmes de Procédure Dans la Jurisprudence Internationale*, 91 RECUEIL DES COURS 533, 609 (1957) (deriving the notion of *lis pendens* from the applicability of a rule of *res judicata*).

129. See *supra* text accompanying notes 18-23.

130. Note that the Appellate Body in *Mexico-Soft Drinks* highlighted that it was "undisputed that no NAFTA panel as yet has decided the 'broader dispute' to which Mexico has alluded." Appellate Body Report, *Mexico-Soft Drinks*, *supra* note 1, ¶ 54.

definition the other proceeding has already been completed.<sup>131</sup>

Further, because some international courts and tribunals may take years to resolve a single dispute, it may not be a bad idea to pressure them to expedite their proceedings. Encouraging a race to a ruling (that is, applying *res judicata* only, not *lis pendens*) will be more effective than encouraging a race to court (that is, applying *lis pendens* as well as *res judicata*). A tribunal's decision will prevail—even though the tribunal was seized last—so long as the tribunal's decision comes first.

Taken together, Cuniberti's arguments against *lis pendens* and the previously mentioned reasons in support of applying *res judicata* but not *lis pendens* lead to the conclusion that, in the context of contemporary international law, courts should not automatically apply the principle of *lis pendens* as a preclusion doctrine to resolve overlaps between international proceedings.<sup>132</sup> Put differently, *lis pendens* and its underlying time-based rationale should, at best, be applicable only on a case-by-case basis on condition that the competing fora are the same or comparable and other conditions are satisfied. Indeed, other than as a strict preclusion doctrine, the rationale behind *lis pendens* remains useful in at least three ways. First, *lis pendens* considerations may sometimes justify a temporary stay in the proceedings of the second seized court. Second, *lis pendens*' underlying rationale must be stressed as a starting point for the drafting of treaty clauses on forum selection to avoid the multiplication of proceedings. An ongoing procedure should then stop a later one in the event that explicit treaty

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131. The Permanent Court of International Justice faced an analogous problem in *Factory at Chorzów* and considered that

the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.

*Factory at Chorzów* (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A.) No. 9, at 30 (July 26).

132. The *SPP v. Egypt* tribunal put it more bluntly: "When the jurisdiction of two unrelated and independent tribunals extends to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction." *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (1985), 3 ICSID Reps. 112, 129 (1995). Similarly, the Inter-American Court of Human Rights refused to decline jurisdiction because similar proceedings were pending before the ICJ. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, at 60-65 (Oct. 1, 1999). Further, the Court held that it was an autonomous adjudicator and that conflicting interpretations of one same body of law was the sad consequence of a non-integrated legal system. *Id.*; see also *Camouco* (Pan. v. Fr.), 39 I.L.M. 666, 678 (Int'l Trib. L. of the Sea 2000) (ITLOS refused to decline jurisdiction on the ground of *lis pendens* because similar proceedings were pending before French domestic courts). Courts ruled similarly in *Certain German Interests in Polish Upper Silesia* (F.R.G. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25); *Southern Pacific Properties*, 3 ICSID; *Holiday Inns S.A. v. Morocco*, ICSID (W. Bank) Case No. ARB/72/1 (1972). But see *SGS Société Générale de Surveillance S.A. v. Republic of Pakistan*, ICSID (W. Bank) Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶ 161, 42 I.L.M. 1290, 1317-18 (2003). Although those cases reference differences between international and domestic courts, respectively, the fact remains that, to date, tribunals within the international system are generally less comparable than courts in many domestic systems.

clauses exist to this effect (such as a fork-in-the-road provision that, after all, has *lis pendens* features).<sup>133</sup> Third, *lis pendens* can be one of several factors to be looked at under abstention doctrines or emerging principles of coordination in international law (such as the notion of “natural forum” discussed here).<sup>134</sup>

In addition, and perhaps most importantly, even if international courts and tribunals were to apply *lis pendens*, the conditions for its application are so strict that, in effect, the principle would rarely ever apply.<sup>135</sup> Specifically, the traditional requirement of full competence—that the earlier court be able to resolve the legal cause of action (*causa petendi*) brought in the later court—would hardly ever apply across international tribunals. To wit: a *causa petendi* before a WTO panel is a claim of violation of a WTO rule, whereas a *causa petendi* before a NAFTA panel is a claim of violation of a NAFTA rule. Traditional *lis pendens* doctrine would allow parallel proceedings in this case. Applying *lis pendens* then is at best a fig leaf designed to cover cracks in the international system; at worst, it is false judicial deference or comity. Courts or tribunals applying *lis pendens* give the impression of an open mind and readiness to apply general principles but know that these principles do not apply or do not solve the problem.

Finally, as with *res judicata*, to the extent that *lis pendens* applies as a general principle of law, it would—pursuant to the distinction set out earlier between jurisdiction and admissibility—relate to admissibility, not to jurisdiction.<sup>136</sup> If so, tribunals should not normally consider *lis pendens* unless either party raises it.

### C. *Forum Non Conveniens*

If *lis pendens*’ chronological rule fails because it presumes too much similarity between different international fora, *forum non conveniens*—a doctrine that stays or dismisses a proceeding when another forum is more “convenient”<sup>137</sup>—initially seems to offer a way out. *Forum non conveniens*, however, is not the answer. First, it is almost exclusively known in common law systems and it could be difficult to sell it as a “general principle of law.”<sup>138</sup>

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133. Of course, in this case, the effect of the first proceeding would flow from the treaty clause, and not from the principle of *lis pendens*.

134. See *infra* Part V.

135. See *supra* notes 123–124 and accompanying text.

136. Article 35 of the European Convention on Human Rights classifies at least one instance of *lis pendens*—where the application “has already been submitted to another procedure of international investigation or settlement and contains no relevant new information”—as an issue of admissibility, not jurisdiction. ECHR, *supra* note 55, art. 35(2)(b).

137. See Kwak & Marceau, *supra* note 40, at 480.

138. But note that civil law traditions often have rules regarding so-called “related actions,” discussed *infra* notes 163–167. Although these laws share core features of the common law principle of *forum non conveniens*, they derive from statutory provisions and may therefore be difficult to reconcile with common law approaches. See RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 2 (2007) (not-

Second, and more importantly, the original and often decisive criterion for a court to declare itself a *forum non conveniens* are arguments of “convenience to the parties” such as practical claims of hardship to the defendant, not arguments as to the appropriateness of the court or its proceedings as such. The standard case is an individual or corporation being sued before a foreign court and that court declaring that forcing a foreign defendant to defend itself before it is “unduly burdensome” (evidence must be moved, witnesses transported, experts in foreign law hired, etc.), thereby making the forum “inappropriate.”<sup>139</sup> Put differently, one of the main reasons to apply *forum non conveniens* is territorial and relates to the physical distance or lack of connection between the defendant and the forum. In inter-state disputes before an international tribunal, this geographical factor is almost irrelevant. As Vaughan Lowe points out,

Unlike municipal litigation a move in the location of an inter-state action before an international tribunal does not entail the need to employ experts to handle questions of foreign law, or the need to maintain separate legal teams . . . . In inter-state disputes, the lawyers prepare the case; they get on the plane; they get off, and they litigate. Where they do it is a matter of little legal significance.<sup>140</sup>

Third, and equally crucial in the domestic context, a court will generally declare itself an “inconvenient” forum if the alternative, foreign court would have jurisdiction to decide the whole dispute before it.<sup>141</sup> Now, as pointed out earlier, the division of labour among international tribunals is not territorial but functional and/or treaty-based. Hence, even though in, for example, the *Soft Drinks* case one could have argued that NAFTA was a more appropriate forum than the WTO, the WTO could (strictly speaking) only apply *forum non conveniens* if it was sure that the dispute before it could also be decided before NAFTA. Yet, a NAFTA tribunal cannot decide claims of violations of WTO law (and vice versa);<sup>142</sup> and, as pointed out earlier, NAFTA Chapter 20 proceedings are procedurally deficient. In overlaps between a trade tribunal and other specialized international tribunals the problem is even more acute. ITLOS may consider that a dispute is bet-

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ing that common law rules presume greater judicial discretion than analogous civil law rules).

139. Lowe, *supra* note 18, at 200.

140. *Id.* at 201.

141. This would be the case in most common law jurisdictions, one exception being Australia. Compare *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), with *Oceanic Sun Line Special Shipping Co. Inc. v. Fay* (1988) 165 C.L.R. 197, 243 (Austl.) (opinion of Deane, J.). See generally *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 (H.L. 1987) (appeal taken from Eng.); BRAND & JABLONSKI, *supra* note 138.

142. The Appellate Body explicitly pointed this out, noting that “Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA.” Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 1, ¶ 54. Indeed, Mexico’s alleged right to higher sugar quotas in the U.S. market was only enshrined in NAFTA, not in the WTO. Thus, even where a NAFTA panel would somehow find itself an “inconvenient” forum, it could not refer the dispute to the alternative tribunal, here the WTO, because the WTO cannot decide on Mexico’s sugar quota claims. In such event, the principle of *forum non conveniens* as it is known in domestic law cannot apply.

ter settled at the WTO; yet, at present, the WTO could never deal with the dispute's claims of violation of UNCLOS. Therefore, to refer the case from ITLOS to the WTO based on the principle of *forum non conveniens* as it is known in domestic law would be impossible. As Cuniberti pointed out: "[i]t would not be permissible, for any adjudicator, to decline jurisdiction without ensuring that the competing adjudicator would have jurisdiction over the whole dispute. Any decision to the contrary would amount to a denial of justice."<sup>143</sup>

Finally, the principle of *forum non conveniens* in common law systems is a discretionary abstention doctrine; that is, the court has field-jurisdiction over the dispute but decides not to rule on the claims based on propriety considerations. *Forum non conveniens* involves, by definition, a weighing and balancing between the interests of the plaintiff and those of the defendant and the administration of justice more generally. As noted earlier, civil law systems are wary about giving this kind of discretion to courts.<sup>144</sup> The same is true for international tribunals where the fear of judges as "lawmakers" is even greater.

For this reason, it was bad strategy for Mexico in the *Soft Drinks* dispute to concede up front that the WTO *had* jurisdiction over the case and to argue only that the WTO should decline to *exercise* this jurisdiction based on its inherent discretionary powers as a judicial body (not based on admissibility as argued above). In civil law systems, as well as before international tribunals, once a judge *has* jurisdiction, it will be difficult to convince her not to *exercise* it without identifying a legal impediment to such exercise.<sup>145</sup> Not surprisingly, therefore, based on Mexico's defence strategy, the panel in *Soft Drinks* found that "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."<sup>146</sup> Mexico should instead have argued that the WTO did not have (or had lost) jurisdiction in the first place, or more precisely—and based on the distinction between jurisdiction and admissibility—that the United States was precluded from having a WTO remedy by the operation of NAFTA's fork-in-the-road clause. Put differently, Mexico could have made the case that even though the panel had jurisdiction over the dispute, in these specific circumstances the United States' request was simply not admissible.

The Appellate Body was, fortunately, more careful, finding that, although in this case it saw no reason to decline jurisdiction, it expressed "no view as to whether there may be other circumstances in which legal

143. Cuniberti, *supra* note 24, at 421; see also *Factory at Chorzów* (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A.) No. 9 (July 26); Int'l Law Ass'n, *Recommendations on Lis Pendens and Res Judicata and Arbitration*, Annex 1, Res. No. 1/2006, June 8, 2006.

144. But see the rules on "related actions" which do grant judicial discretion, discussed *infra* notes 163-167.

145. Put differently, before both civil law courts as well as international tribunals, it is better to make preclusion arguments ("you do not have jurisdiction" or "the claim is inadmissible") rather than abstention arguments ("you have jurisdiction but should not exercise it").

146. Panel Report, *Mexico—Soft Drinks*, *supra* note 3, ¶¶ 7.1, 7.18.

impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.”<sup>147</sup> When concluding, the Appellate Body upheld the panel’s ruling that “under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it.”<sup>148</sup> The Appellate Body did leave the door open for future panels to decline jurisdiction or to find jurisdiction and decide not to exercise it on the ground that the claim is inadmissible by adding that it finds it “unnecessary to rule in the circumstances of this appeal on the propriety of exercising such discretion.”<sup>149</sup>

There can be no doubt that the U.S. claim of a violation of GATT Article III as it related to the Mexican sweetener tax falls within the field-jurisdiction of WTO panels as well as within the terms of reference of the specific *Soft Drinks* panel that decided the case (as defined by the U.S. panel request and DSU Article 7). There is, however, another question, namely, whether there are legal impediments which may take away this jurisdiction or preclude the United States from obtaining a ruling on the merits because of the inadmissibility of the claim. It remains to be seen what these legal impediments may be, as well as whether these impediments take away or preclude a panel’s jurisdiction as such or whether they only render the claim inadmissible. As discussed earlier, the distinction between jurisdiction and admissibility is commonly upheld by international tribunals and should also find a place in WTO jurisprudence. If so, one of the consequences of classifying, for example, *res judicata* or a forum clause in NAFTA or another FTA as a claim of inadmissibility (not jurisdiction), is that this claim must be raised by either party and could then not be decided by a WTO panel at its own initiative.

## V. A Reformulated *Forum Non Conveniens* Principle: *Le Juge Natural* or Natural Forum

Notwithstanding the above four arguments<sup>150</sup> that make it difficult to apply *forum non conveniens* to overlaps among international tribunals, *forum non conveniens* does have features that make it attractive in an international context, especially as compared to *lis pendens*.

First, whereas *lis pendens* assumes that the competing tribunals are the “same” or at least “comparable” (and, therefore, applies a mechanical time factor), the very reason to apply *forum non conveniens* is that the alternative tribunals are “different.”<sup>151</sup> More specifically, when *forum non conveniens*

147. Appellate Body Report, *Mexico–Soft Drinks*, *supra* note 1, ¶ 54 (highlighting a caveat repeated later in this paragraph as: “[w]e do not express any view on whether a legal impediment to the exercise of a panel’s jurisdiction would exist in the event that features such as those mentioned above were present”) (emphasis added).

148. *Id.* ¶ 57 (emphasis added).

149. *Id.* (emphasis added).

150. The four arguments are difficulties stemming from the common law roots of *forum non conveniens*, that convenience is largely geographical, an alternative forum must be able to decide the whole dispute, and that the principle of *forum non conveniens* implies judicial discretion.

151. Cuniberti, *supra* note 24, at 383.

is applied, there is substantial evidence that the seized court is not “convenient” or “appropriate” as compared to another forum which, by definition, is more convenient and, therefore, quite different.<sup>152</sup> English case law, for example, requires that the foreign forum be clearly and distinctively more appropriate.<sup>153</sup> As discussed earlier, in the newly emerging field of overlapping international tribunals, tribunals are divided on treaty lines and are both substantively and procedurally quite different.<sup>154</sup> The fact that the *forum non conveniens* principle is a rule on overlap between tribunals that are inherently different makes it attractive for application in the current international context (or, at least, more attractive than the mechanical time factor of *lis pendens*). Nonetheless, *lis pendens* would remain relevant to some extent as one of possibly several elements in a *forum non conveniens* analysis. Thus, in cases where multiple forums are considered to be similarly appropriate, an adjudicator could factor the evolution of parallel proceedings elsewhere in the *forum non conveniens* analysis.

Second, whereas *forum non conveniens* focuses on geographic “convenience to the parties,” it also considers the broader demands of the efficiency in the administration of justice.<sup>155</sup> Such broader elements may include references to connections of the competing adjudicators to the dispute and focusing on which of two international tribunals is “more appropriate.” Even though *forum non conveniens* traditionally (with the exception of U.S. law) excludes a comparison of the merits of the procedural laws of each adjudicator, the skills of the judges, or the substantive quality of the justice provided (including remedies and enforceability), for overlaps between international tribunals these factors may be worth looking at, especially given the diverse stages of development, institutional contexts, expertise, and levels of legitimacy or support that surround today’s panoply of international courts and tribunals.<sup>156</sup>

Finally, the fact that the jurisdiction of most international tribunals is treaty-based—with the result that few overlaps will address the same legal cause of action and, therefore, trigger *res judicata* or *lis pendens*—would not stop the operation of a *forum non conveniens*-type principle adapted to international law. Indeed, when an English court declares itself as “inconvenient” to decide a dispute, it need not first assure itself that there is a foreign court which can or is currently examining the dispute under the exact same cause of action.<sup>157</sup> Although the dispute must fall within the jurisdiction of the alternative court, there is no requirement that this court examine the dispute under the same cause of action (unlike for *res judicata* or *lis pendens*). On the contrary, in many cases before the English court, the cause of action would be English law, and the foreign court would use

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152. *Id.* at 406.

153. *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460, 476–78 (H.L. 1987) (appeal taken from Eng.).

154. See *supra* note 28 and accompanying text.

155. Cuniberti, *supra* note 24, at 383.

156. *Id.* at 424; see also Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1236–43 (2005).

157. See Cuniberti, *supra* note 24, at 406–07.

its own law (unless, of course, either forum applies foreign law). As Cuniberti points out, “the emphasis is not put on actions or disputes, but on courts and processes.”<sup>158</sup> Once more, this type of overlap among tribunals examining a cause of action that is different makes *forum non conveniens* a principle particularly attractive in an international context.

In sum, if a general principle to regulate overlaps among international tribunals would need to be developed in the medium- to long-term, the best candidate to use as a starting point would be *forum non conveniens* adapted to the specificities of international law. For those who fear the common law roots of this notion, a different term could be utilized, such as the principle of searching for *le juge naturel* or the “natural forum” to decide a particular dispute. There is a common quest across legal systems for the *forum conveniens* or the natural forum to decide specific disputes,<sup>159</sup> often defined as the adjudicator “with which the action ha[s] the most real and substantial connection.”<sup>160</sup> Common law systems focus on judicial discretion to manage unfair assertions of jurisdiction, whereas civil law countries endeavour to establish the natural forum through general jurisdictional organization and to protect that forum through the individual guarantee of the independence and impartiality of the court consecrated in the principle of *le juge naturel*.<sup>161</sup> However, one must recognize that establishing *a priori* natural fora in domestic systems is hard, but it may be even harder in international law, as the latter generally lacks traditional connecting factors of a territorial character. Because the struggle for the international *juge naturel* or natural forum is likely to operate on the basis of the subject matter of the dispute, rather than the geographic origin of the relevant facts or the nationality of the parties—and will, therefore, vary case by case—some room for judicial definition of the natural forum in international law seems to be unavoidable. Moreover, because international law is decentralized and jurisdiction is defined by focusing on one tribunal’s constitutive instruments, granting some measure of judicial discretion could ease judicial calibration of unfair assertions of jurisdiction.<sup>162</sup>

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158. *Id.* at 407.

159. See generally BELL, *supra* note 12.

160. *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460, 478 (H.L. 1987) (appeal taken from Eng.).

161. LE DICTIONNAIRE DE L’ACADÉMIE FRANÇOISE DEDIE AU ROY 614 (Jean Baptiste Coignard ed., 1694) (*le juge naturel* as the court “in which a case belongs naturally, ordinarily, and by law”); see, e.g., INT’L COMM’N OF JURISTS, INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS: A PRACTITIONERS’ GUIDE 7-11 (2004), available at <http://www.icj.org/IMG/pdf/Guide.pdf>; Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 619 (Shimon Shetreet & Jules Deschênes eds., 1985).

162. See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1027-52 (2006) (contrasting the United States’ “in or out” approach to jurisdiction and the European “us or them” approach, and arguing that judicial discretion, in the American context, tempers excessive assertions of jurisdiction). According to Michaels, it is this “externalization” which allows the United States to maintain its “unilateral” posture. *Id.* at 1037. Analogously, the international law’s approach to jurisdiction, which is based on the constitutive instrument of each individual tribunal, might gain (in a con-



To further comfort possible critics who may feel that *forum non conveniens*-type rules are wedded to common law systems, it is important to note that many civil law countries have statutory provisions that operate much like *forum non conveniens*—namely rules on so-called “related actions.”<sup>163</sup> Unlike *forum non conveniens*, rules on “related actions” can only be triggered when parallel proceedings are pending; yet, like *forum non conveniens*, rules on “related actions” are triggered even if the cause of action is not the same (it is enough that they are “related”).<sup>164</sup> Similarly, the decision whether or not to stay or relinquish jurisdiction is within the discretion of the judge who can evaluate, *inter alia*, which of the two fora is more convenient or appropriate.<sup>165</sup> Explicit forum selection clauses<sup>166</sup> and so-called fork-in-the-road clauses<sup>167</sup> similarly regulate “related”—though not exactly the same—“actions.”

In sum, further development of any regulating principle such as the natural forum will most likely come hand in hand with a further move on all four of the scales or variables hinted at earlier, especially: (1) from a party-focus to a legality-focus in international dispute settlement, (2) from a regime to a system approach, (3) from consensual to compulsory jurisdiction, and (4) from specific to general jurisdiction. On the basis of such a nascent principle as the “natural forum,” the history, prior procedures, substantive content, and/or core issue in dispute could then make, for

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text of expanded judicial settlement) from some form of judicial calibration such as *forum non conveniens*.

163. See NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 101, translated in THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 20, art. 101 (Nicolas Brooke trans., 2007) (“If there is a link between matters which are before two different courts, which in the interests of justice requires that they should be determined together, one of the courts may be asked to decline jurisdiction and to refer the whole matter to the other.”).

164. Cuniberti, *supra* note 24, at 406–07.

165. See Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 28, 2000 O.J. (L 12) 1, 9 (EC).

Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. . . . For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

*Id.* (emphasis added).

This provision has been described as “a robust doctrine of *forum non conveniens*” except in that only the second court seized can apply it. See Von Mehren, *supra* note 12, at 370.

166. ECHR, *supra* note 55, art. 35(2)(b) (“The [European] Court [of Human Rights] shall not deal with any application submitted under Article 34 . . . that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”) (emphasis added).

167. NAFTA art. 2005.

[D]isputes regarding any matter arising under both this Agreement and the [GATT], any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party . . . . Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other . . . .

example, the WTO or ITLOS the natural forum to decide a specific dispute.<sup>168</sup> Doctrines asserting inherent powers of international tribunals already provide some leeway for declining or asserting jurisdiction (or deciding on the admissibility of a claim)<sup>169</sup> on the basis of *forum non conveniens*-like considerations directed at the subject matter of the dispute. In particular, international tribunals possess the jurisdiction to “interpret the submissions of the parties” so as to “isolate the real issue in the case and to identify the object of the claim,”<sup>170</sup> as part of their well-established power to determine their own competence.

## Conclusion

The main purpose of this article is to demonstrate that domestic law principles addressing forum shopping between domestic courts—*res judicata*, *lis pendens*, and *forum non conveniens*—do not resolve potential concerns of forum shopping among international tribunals. Even where these principles apply as “general principles of law,” the conditions for their application are so strict—especially the requirement that the “cause of action” be the same—that they will hardly ever be triggered. Indeed, where international tribunals do consider, in particular, *res judicata* or *lis pendens*, one cannot help but think that these principles are merely used as a fig leaf to go ahead and decide the case anyhow. In the short- to medium-term, the best way to address forum shopping among international tribunals is to regulate overlaps explicitly in the relevant treaties.<sup>171</sup> General principles of law will simply not do. Yet, for these explicit treaty clauses to have effect, international tribunals, including the WTO Appellate Body, must be ready to refer to those clauses even if they were included in a treaty

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*Id.* art. 2005, paras. 1, 6. (emphasis added).

168. See ROSENNE, *supra* note 13, at 519 (“[T]he true nature of the dispute at hand is the real factor to determine to which court or tribunal a particular dispute should be submitted.”).

169. For the reasons discussed under *res judicata* and *lis pendens*, it may, indeed, be more appropriate to classify the principle of *le juge naturel* or the natural forum as one that relates to admissibility rather than jurisdiction. See *supra* notes 113–114, 136 and accompanying text.

170. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 262 (Dec. 20); see also Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 437 (Dec. 4); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 466 (Dec. 20).

171. See Olivos Protocol for the Settlement of Disputes in MERCOSUR art. 1(2), Feb. 18, 2002, 42 I.L.M. 2; NAFTA art. 2005; see also Consolidated Version of the Treaty Establishing the European Community art. 292, Dec. 29, 2006, 2006 O.J. (C 321) E/172, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>; Foreign Investment Protection and Promotion Agreement, Can.-Thail., art. XIII(3), Jan. 17, 1997, Can. T.S. 1998/29, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/THAILAND-E.PDF> (“An investor may submit a dispute . . . to arbitration . . . only if: the investor has consented in writing thereto; and the investor has waived its right to initiate or continue any other proceedings . . .”); UNCLOS, *supra* note 105, art. 282 (underlying the stay in the proceedings in *MOX Plant*); Waste Mgmt., Inc. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/00/3, ¶ 27 (NAFTA Ch. 11 Arb. Trib. 2004), 43 I.L.M. 967, 972 (2004) (discussing NAFTA art. 1121).

other than the forum treaty.<sup>172</sup>

Procedurally, reference to such clauses is possible under objections to admissibility, which are distinct from the question of jurisdiction. Fortunately, the Appellate Body in *Soft Drinks* has left this possibility open.<sup>173</sup> As a result, if a WTO panel is, for example, asked to decide a dispute which was previously brought to NAFTA or MERCOSUR, and the fork-in-the-road clause in NAFTA Article 2005:6 or Article 1.2 of the Olivos Protocol applies, the WTO panel should simply apply the fork-in-the-road clause agreed to by both parties instead of going through general principles such as *res judicata* or *lis pendens*. Based on such a forum-selection clause, the panel should then decline to rule on the substance of the claims made before it based on the *inadmissibility* of the specific WTO complaint (to be distinguished from the *field-jurisdiction* of the panel over the facts, which remains intact). In addition, even if as a result of the strict conditions for *res judicata* to apply the decisions of one international tribunal will only rarely preclude proceedings before another, the tribunals should at least exercise mutual deference and comity by staying their proceedings in some cases<sup>174</sup> and avoiding double counting the remedies they award.<sup>175</sup> In the medium- to long-term, if general principles develop to address forum shopping among international tribunals, the best starting point is a reformulated *forum non conveniens* clause adapted to the requirements of international law. Any notion of the *juge naturel* or natural forum should focus not on mechanical criteria, such as time, but on material criteria, such as connections of the case with a tribunal's jurisdiction, the history, prior procedures, substantive content, or core issues in dispute as well as the institutional context, expertise, and legitimacy of the respective tribunals.

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172. See generally Pauwelyn, *supra* note 46, at 997-1030.

173. See generally Appellate Body Report, *Mexico-Soft Drinks*, *supra* note 1.

174. See *MOX Plant Case* (no. 3) (Ir. v. U.K.), Suspension of Proceedings on Jurisdiction and Merits (Perm. Ct. Arb. 2003), 42 I.L.M. 1187, 1189-91 (2003) (where the Permanent Court of Arbitration opted for a stay in the proceedings pending the resolution of issues of E.C. law, including the possibility that Article 292 of the E.C. Treaty precluded the Permanent Court of Arbitration's jurisdiction in its entirety); see also *Case C-459/03, Comm'n v. Ireland*, 2006 E.C.R. I-4635; *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (1985), 3 ICSID Rep. 112, 129 (1995) (where the ICSID tribunal stayed its proceedings pending a decision of the French *Cour de Cassation* based on comity considerations).

175. See Decision of the Arbitrator, *United States-Tax Treatment for "Foreign Sales Corporations"*, *Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, ¶¶ 6.27-6.33, WT/DS/108/ARB (Aug. 30, 2002) (holding that compensation corresponding to the full amount of the subsidy were "appropriate countermeasures," but stating that the determination of "appropriate countermeasures" should take into account the existence of multiple complainants, whenever this is the case).